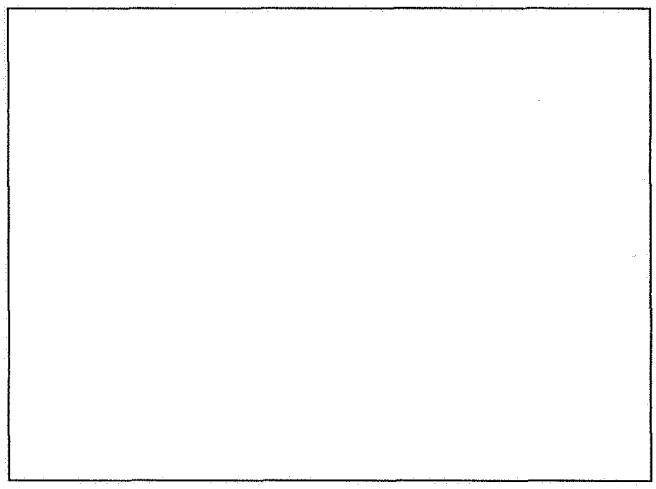
Regulation of Labour Hire Arrangements : A Study of Queensland Labour Hire Agencies



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STATEMENT OF ORIGINALITY

The work presented in this thesis is, to the best of my knowledge and belief, original and my own work, except as acknowledged in the text. The material has not been submitted, either in whole or in part, for a degree at this or any other university.

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Dr Andrew Greinke (Principal Advisor)

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Abstract

Labour hire has been described as a unique phenomenon of our times. As a response to a changing economic, managerial and regulatory environment, it represents a controversial area of great legal, industrial and social significance. It now represents an emerging and established part of the employment scene in Australia and internationally. It is thus timely and relevant to investigate its operation and the rules that apply to it. As a work form labour hire is a tripartite arrangement between a labour hire agency, client organisation and worker, whereby the agency hires out for fee a worker to perform work for a client, mostly on a casual basis.

This thesis develops a theory for the rapid growth of labour hire both here in Australia and overseas, and seeks to explain the increasing attraction of labour hire for business organisations. The thesis also draws out the tensions that exist between labour hire and the traditional common law employment tests that are supposed to govern it. At present there is little information on how labour hire agencies operate and are regulated. This project addresses this shortfall to fill this gap in the legal literature.

Research into the growth of the labour hire market is important, because of the marked rise in the use of labour hire compared with previous employment patterns in Australia. In particular the use of labour hire agencies for the engagement of labour has enjoyed a growth in the last decade in Australia. In the last five years too there has been a

dramatic interest in labour hire for governments in Australia, with major inquiries undertaken by Commonwealth and State governments as to the general effects of labour hire. The general findings in those inquiries have been tied in to the more specific findings of this study.

This thesis has three objectives. Firstly to show that because of its unique tripartite nature, a labour hire situation is counter to or is antithetical to the notions and concepts of the traditional common law employment situation, and that the standard common law employment tests (even allowing for judicial flexibility) are under strain when applied to it.

Secondly to explain the growth of labour hire as a reaction to the impact of regulation, of adding further costs and obligations on employers. As a consequence of this, there are incentives for employers to go to less or largely unregulated labour markets such as labour hire, which offer the prospect of potentially cheaper labour costs overall, and more importantly immunity from the legal obligations of an employer, such as unfair dismissal and workers' compensation obligations. Such a trend has led to the situation of a primary core market of employees, and a secondary market of employees with fewer privileges.

Thirdly to obtain empirical information about labour hire in Queensland using extensive exploratory field work interviews with labour hire agencies, peak business groups, unions and some labour hire workers. The results from this research support the above propositions.

In the empirical study the author paid particular attention to obtaining information on the following issues –to what extent labour hire arrangements are used; what types of labour hire arrangements are entered into; when labour hire arrangements are used; why labour hire arrangements are used; the impact of labour hire on occupational health and safety and other issues; what are the problems associated with labour hire; and what legal instruments are used in relation to labour hire.

It is shown in the thesis that the application of common law employment principles to labour hire is problematic in a number of areas such as unfair dismissal of a worker, vicarious liability and anti-discrimination legislation.

In addition the research fieldwork conducted backs up American and Australian theories and evidence, that a prime factor in the expansion of labour hire is the increasing regulatory impact on standard employment. The work supports American studies which contend that a major reason for the use of flexible (labour hire) staffing is to avoid the mandated costs associated with standard labour. The thesis also promotes greater recognition of the possible unintended consequences of regulation of employment. The imposition of perceived increasing regulatory burdens has had the effect of forcing employing organisations into less onerous alternative labour markets such as labour hire, where an increasing number of workers enjoy less security of tenure.

The preceding findings show that common assumptions that labour hire is just a creature of economic and managerial concerns are incomplete. The results therefore make an important contribution to the understanding of the concept of labour hire.

Implications about the nature of labour hire will be drawn in the concluding chapter, including the need for correction of anomalies and the need for regulation of labour hire.

TABLE OF CONTENTS

Chapter One

Overview

Labour hire as a form of employment is not a new phenomenon but has experienced rapid growth in the last decade in Australia and overseas. As a work form labour hire represents a distinct departure from the longstanding notion in Australia of a largely permanent and stable workforce, and is an alternative form of employment to the direct employer/employee relationship. At the present time there is little information on how labour hire agencies actually operate and are regulated. Research on labour hire employment is largely undeveloped, though in recent times a marked interest has been shown by governments in Australia through major general inquiries. This thesis addresses this shortfall to help fill this gap in the literature, with a particular emphasis on Queensland. It has been noted that there is an important gap in understanding why firms use labour hire because present information is essentially anecdotal or from case studies (Laplagne, Glover and Fry, 2005:3). Labour hire is a burgeoning area. It is thus timely and relevant to investigate the reasons for its rapid increase and its implications from a legal perspective.

While labour hire arrangements have been a part of the Australian labour market for decades, recent data confirms that in recent years there has been substantial growth in the labour hire industry, with many organisations increasing their use of labour hire arrangements in preference to direct employment. Labour hire has now emerged as a substantial component of the Australian labour market.

In its infancy labour hire was used essentially to fill temporary positions created by staff absences or brief spurts in demand, mainly in clerical areas. Now labour hire is used across a broad spectrum of industries, and is prevalent in manufacturing to computer programming, and from finance to construction.

Statistics show that labour hire has grown substantially between 1990 and 2002 in Australia. The number of labour hire workers at workplaces with 20 or more employees rose from 33,000 in 1990 to 190,000 in 2002, which was an increase of 15.7 per cent a year. The rise in the proportion of labour hire workers among all employees at those workplaces has been quite significant, increasing almost fivefold, from 0.8 per cent in 1990 to 3.9 per cent in 2002. Overall labour hire workers numbered about 270,000 to 290,000 in 2002, around 3 per cent of all employees (Commonwealth House of Representatives Inquiry, 2005: 7, 41, 42).

The above figures support claims (such as by Hall, 2002) of a rapid rise in labour hire employment. They also give validity to estimates by the Australian Council of Trade Unions (ACTU), that labour hire is used at one in five workplaces, and is used by more than half of the largest workplaces (O'Neill, 2004:1).

The distinctive feature of labour hire is that it involves a triangular employment relationship between three parties consisting of a labour hire company or firm (referred to as a labour hire agency), the worker and the client organisation. A simple definition of labour hire is a tripartite arrangement between a labour hire agency, client

organisation and worker, whereby an agency hires out a worker to perform work for the client, mostly on a casual basis.

A more expanded definition of labour hire is as follows:

> Labour hire is a form of indirect employment relationship in which the employer (the agency) supplies its employees to work at a workplace controlled by a third party (the client) in return for a fee from the client. A typical agency will direct an employee to work for a client for a period (assignment) ranging from a single day to a number of years (Power, 2002:64).

As noted by Hall (2002:4) the distinctive characteristic of a labour relationship is the splitting of the contractual and control aspects of an employment arrangement. Unlike the traditional employment situation labour hire or "on-hired" workers spend their working time on the client's premises performing tasks laid down by the client, and under the day to day direction and supervision of the client. However the client organisation has no contractual relationship with the worker, and is not the legal employer of the worker.

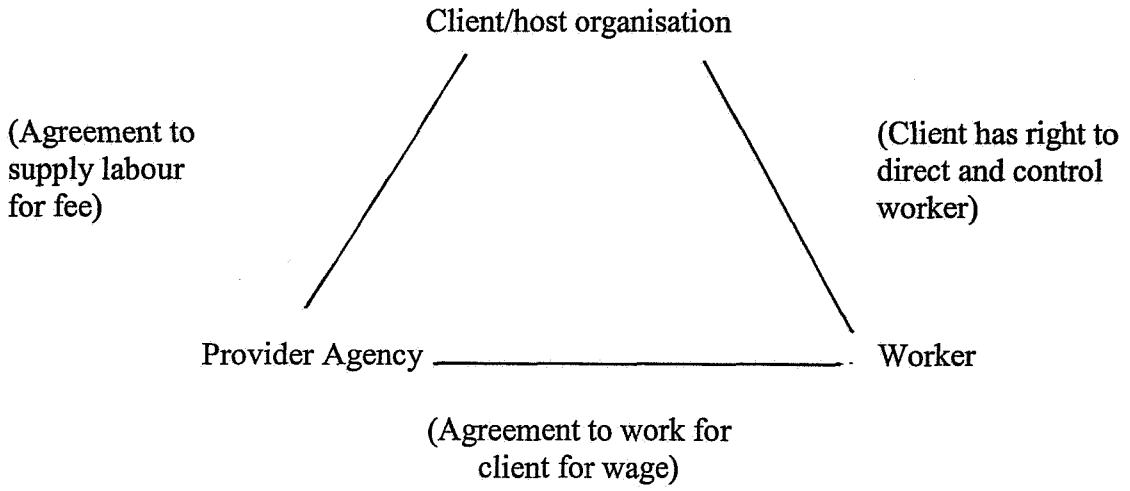
It is the labour hire agency that has a direct contractual relationship as employer with the worker, and is responsible for the worker's payment. The agency at the same time has a contractual relationship with the client for the provision of the worker's services. Paradoxically then, though a labour hire agency has no day to day control over its worker (though it may perform checks on the worker), yet it is the legal employer.

In some situations there is no employment relationship between worker and agency, where the worker is regarded as an independent contractor. Unlike the traditional

employment relationship where the work is done directly for the benefit of the employer, in labour hire the agency as legal employer aims to profit by hiring out its employees to work for others.

Significant features of labour hire that follow from the nature of a labour hire arrangement is that a labour hire agency is not under an obligation to provide ongoing work to a labour hire worker, nor is the worker obliged to accept offered work. Also, importantly, it is generally understood or stipulated that a client organisation can dispense with a worker's services at its discretion, or in agreed circumstance. During an assignment an agency pays the employee a casual rate of pay, which includes a loading as some recompense for missing out on the benefits that permanent workers receive (which include penalty rates for overtime, annual leave, sick leave and long service leave).

A standard labour hire arrangement can be represented as follows:-



Labour hire differs from other employment services that are provided to organisations, such as outsourcing and placement services. While labour hire and outsourcing both entail the absence of a direct employment relationship between the worker and client, labour hire differs from outsourcing in that under labour hire only labour is provided to the client, and the worker provided carries out work under the day to day direction of the client. With outsourcing a party supplies a service or goods, and the workers involved with that undertaking work under the direction of that party.

Placement or recruitment agencies, in contrast to labour hire agencies, provide a placement service to clients for a one off fee, whereby they introduce workers to potential employer organisations, leaving the parties to come to their own employment arrangements. In Queensland they are registered under the *Private Employment Agents Act 2005 (Qld)*. Labour hire agencies differ from placement services in that they have ongoing contractual obligations with a client for the length of the labour hire engagement, and continue to be paid by the client during its duration.

Labour hire agencies are only required to register as placement or recruitment service providers, where they are operating as such. It would seem from the New South Wales Labour Hire Taskforce Report (2001, p.49), that there are not many employment businesses that specialise only in recruitment of permanent staff.

Presently only two Australian States, Queensland and Western Australia, have legislative provisions that specifically recognise a labour hire agency as the employer of a labour hire employee. In so doing the labour hire provisions in effect restate the

common law position, that generally a labour hire agency, not the client or host business, will be found to be the employer of a labour hire worker, where the worker is working for the client under a labour hire arrangement.

Under the *Queensland Industrial Relations Act 1999*[1] labour hire agencies are included in the definition of "employer". Section 6(2) of the Act defines "employer" in part as:

> ..... a group training organisation or labour hire agency that arranges for an employee (who is party to a contract of service with the organisation or agency) to do work for someone else, even though the employee is working for the other person under an arrangement between the organisation or agency and the other person.
>
> "labour hire agency" is defined under section 6(3) as "an entity that conducts a business that includes the supply of services of workers to others".

At present there are no licensing systems for labour hire agencies in the Australian states. The Recruitment and Consulting Services Association (RCSA), a peak body representing labour hire agencies, has instituted a system of self-regulation for agencies that voluntarily join as members. It has set up a code of professional practice to be followed by members.

1.1 Objectives

There are three principal objectives. The first is to demonstrate that the labour hire situation runs counter to or is antithetical to the common law employment principles,

[1] It should be noted that this law will no longer have any effect on any employer now regulated by the *Workplace Relations Act 1996 (Cth)*, as a consequence of the enactment by the "Work Choices" legilsation of a new s.16 in the federal Act. This includes all incorporated private sector employers.

which are used to govern it. It is argued that labour hire is a unique work form which is fundamentally different from the traditional common law employment situation. Labour hire has a special tripartite nature, which involves the interposing of an entity between the worker and the party for whom the work is done, and the splitting of the standard employer responsibilities between an agency and client. It is contended that, because of this splitting of the traditional functions of an employer, the use of labour hire is problematic from a legal (and practical) point of view as regards allocation of risk and responsibility. Traditional common law employment principles, that are applied by the courts to labour hire situations, sit uneasily with the concept of labour hire. Tensions thus exist in the concept of labour hire and present legal principles, which were designed for application to the standard employment situation, predicated on the existence of only two parties. One result is that courts have had difficulty in determining whether liabilities should lie in various cases involving labour hire. At issue is whether the present legal principles adequately cover the labour hire relationship.

The second objective is to demonstrate that the regulatory impact on the standard employment relationship, with its attendant consequences of added costs and obligations on employers, has had the effect of greatly creating incentives for organisations to utilise less regulated or largely unregulated labour markets such as labour hire. The aim is to explain the growth of labour hire as a reaction to the impact of employment regulation.

The theory of the effect of regulation in this study has special value in light of common assumptions about the reasons for the rise of labour hire, which are incomplete. For instance, it has been concluded that (apart from economic factors such as globalisation) labour hire is largely a creature of behavioural managerial attitudes (Laplagne, Glover and Fry, 2005:31).

The third objective is to undertake an empirical examination of labour hire in Queensland to test the first two objectives.

This study promotes a greater analysis and recognition of the consequences (intended or otherwise) of regulation of the standard employment situation. It will be demonstrated from US and Australian literature and studies, and by fieldwork research of the writer, that regulation of the standard employment relationship has had the effect of strongly encouraging organisations into using alternative less regulated labour markets such as labour hire. This move is to escape the regulatory burdens imposed on standard employers, via the common law, legislation and industrial instruments. The rise in the use of labour hire further exacerbates the existing tensions between the concept of labour hire and common law principles.

1.2 Structure

Chapter Two sets out a summary of the history of industrial relations in Australia up to the present time. It describes the establishment of a conciliation and arbitration system at federal and state level. A result of this system has been the growth of national

standards and principles with respect to employment relations, and the development of minimum standards for wages and employment conditions via the creation of awards issued by industrial commissions. A modern development however has been the introduction of workplace or enterprise bargaining between employers and unions for a particular worksite, which has been superimposed on the award system, reducing awards to a safety net of basic conditions.

In addition to general industrial regulation, it is shown that there has been created in Australia specific regulation of the standard employment relationships, in the form of various employer obligations created by legislation, courts and tribunals. Recent developments have involved prohibitions against unfair dismissal of employees, and anti-discrimination.

Chapter Three provides an analysis of legal issues and anomalies, which have been dealt with in Australian case law and legislation. It also examines the input of recent government reports in Australia on labour hire. This analysis gives support to the writer's contentions about the uneasy fit of common law employment principles to labour hire, and the relationship between the rise of labour hire and increased regulation of standard employment. The Australian cases show that there is a blurring of legal obligations on issues such as the identity of the employer, and liability for workplace safety and unfair dismissal of a worker. The disputation as to liability between agency and client as to liability highlights the attraction of labour hire to organisations, of allowing the devolving of the risks associated with direct employment. The results of

the analysis that point to the problematic nature of labour hire, and the effect of employment regulation, is consistent with the theoretical expectations.

Chapter Four critically reviews American and Canadian literature that deals with the regulatory impact on the standard employment relationship, with its attendant consequences of added costs and obligations on employers. The theoretical and empirical literature from North America develop a coherent approach to the prime reasons for the significant increase in alternative work forms such as labour hire. The conclusion drawn by the commentators is that regulation of standard employment has had the effect from an employer point of view of adding further costs and obligations on employers. As a consequence employers in the USA have incentives to go to less regulated or largely unregulated labour markets such as labour hire, which offer the prospect of potentially cheaper labour costs overall, and more importantly immunity from the health and safety, workers' compensation and unfair dismissal obligations on an employer.

Chapter Five describes the research methodology of the project. It sets out the method adopted for the empirical research for the thesis, which was in the form of a qualitative study. An extensive fieldwork system of planned taped interviews were conducted of numerous labour hire agencies, peak business bodies, unions and workers. The interviews followed a standard question format with the opportunity to provide additional information, and the information obtained was subject to strict confidentiality guidelines. The data obtained was grouped for analysis.

Chapter Six sets out the findings of the study. The empirical research consisted of in-depth fieldwork interviews of thirty-four agencies, two peak business bodies, twelve unions and three labour hire workers. There appears to be no similar study undertaken in Australia, into how labour hire agencies operate and the reasons for labour hire. The data obtained was very substantial and covered a number of issues. In particular all questions asked were designed to obtain information, which could be related back to the key research propositions. In particular, the writer was interested in knowing whether the labour market changes in the form of labour hire in Queensland were due to similar reasons to those outlined in North American research.

The result of the fieldwork research provided clear evidence that increasing labour costs and obligations through regulation, in addition to general economic and managerial factors such as labour flexibility, were prime movers in the increasing use by organisations of labour hire, which was largely unregulated. Fear of the unfair dismissal legislation in particular was specifically exposed as a factor for this trend. The research evidence further reinforced the view about the anomaly of applying standard common law employment principles to labour hire.

Chapter Seven concludes the thesis by reviewing its content, identifying the significant contributions, and by including some recommendations on legal approaches to labour hire in the future.

Chapter Two

History of industrial relations in Australia

In this chapter, a description will be given of the general background to employment law in Australia. First, an overview will be made of the history and development of industrial relations in Australia in the last century. Second, there will be a review of the history and development of the various types of regulation concerning employment relations in Australia.

At the outset attention needs to be drawn to the fact that federal legislation has now changed much of the landscape affecting this field. Not only has the federal *Work Choices* legislation released many businesses from unfair dismissal laws (as discussed below), but also the recently enacted *Independent Contractors Act 2006 (Cth)* released many employers from the effect of deeming provisions in Sate industrial laws. These changes need to be borne in mind whilst reading the following historical review of Australian industrial relations legislation which describes the laws in force prior to 27 March 2006, these being the laws which influenced the attitude of the labour hire participants surveyed in the study.

2.1 Growth of employment "mandates" regulation as a link to the theory of labour hire as a reaction to legislation

The Conciliation and Arbitration System

The history of Australian industrial relations has been largely influenced by the distinctive system of conciliation and arbitration adopted in Australia a century ago. This system set in place general institutional arrangements controlling the circumstances of employment that existed, at least in part, right up to the present (Gardner, 1997:13).

A system of arbitration, or state intervention through industrial tribunals to determine industrial disputes, arose in Australia, due to various factors. These factors included widespread industrial disputation in the form of strikes, the growing strength of the labour movement in Australia, liberal ideas favouring state interaction to uphold the public interest and dissatisfaction with existing bargaining processes (Macintyre and Mitchell, 1989:18). Compulsory arbitration has been described as a "justice system" that lays down a way of resolving industrial disputation, by establishing bodies and prescribed steps to resolve industrial disputes between employers and unions representing employees (Strauss 1990:86). In the view of one of the initial judges of the Federal Conciliation and Arbitration Court, Higgins, J., arbitration represented a "new province for law and order" (Higgins 1922:2).

The Australian States initiated compulsory arbitration legislation towards the end of the nineteenth century. Victoria did so in 1896. South Australia and Western Australia followed in 1900, and New South Wales in 1901. At the national level, the

Commonwealth government introduced national legislation (the *Conciliation and Arbitration Act*) in 1904.

A distinctive characteristic of the industrial tribunals or commissions established at the federal level and in New South Wales, South Australia and Queensland was the authority of the tribunals to act in the public interest. The arbitration system was envisaged to be an equitable way of protecting the public interest through the maintenance of industrial peace (Gardner 1997: 16, 163).

The system of compulsory (as opposed to voluntary) arbitration legislation set up in Australia had the following features (Gardner 1997:17, 162):

- Permanent tribunals and procedures to resolve disputes where conciliation has failed.
- These tribunals to deal with an industrial dispute at the behest of one party. The consent of all parties to the dispute is not required.
- Regulation and registration of representative bodies for employees (unions) and for employers.
- Resolution of industrial disputes (where conciliation between the parties has failed) by compulsory hearings by tribunals, whereby the awards or settlements made by the tribunals are legally binding upon the parties and can be legally enforced.
- Limiting of industrial action during the disputes (strikes and lock-outs prohibited during the arbitration process).

In the determination of industrial disputes awards and agreements were made that prescribed employment conditions. Any awards created were legally enforceable because they were regarded as having the effect of legislation. For example, a federal award or registered agreement was enforceable as a matter of federal law and would prevail over any inconsistent law of a State or Territory.[1]

The arbitration systems at federal and state level have controlled to a large degree employment relations in Australia. Only in the 1990s has there been any significant change to this situation in the form of enterprise or workplace bargaining.

State tribunals or commissions have wide ranging authority to take action about industrial issues, and are not limited by having to find a special dispute to claim jurisdiction. The State tribunals can make general or common rules, which are decisions that have application to all employees in a certain industry or within a state (Creighton and Stewart 2005:172).

A result of the arbitration system at federal level has been the growth of national standards and principles with respect to employment relations, and the development of minimum standards for wages and employment conditions.

The concept of a minimum or basic wage was developed by the Federal tribunal (originally the Commonwealth Arbitration Court) in the early twentieth century,

[1] It should be noted that now no new federal awards can be made, and any new state awards will not bind private sector employers.

(Creighton and Stewart, 2005). The idea of a basic wage, tied to calculations of a living wage, was developed during this period. The basic wage was intended to represent the minimum or base amount that could be paid as wages, being the minimum rate for unskilled work, (Creighton and Stewart 2005:51,52).

From this basic wage the wages for skilled employees have been worked out by adding an increment for the possession of the skill. Further, as the basic wage has been regarded as a living wage it has been changed according to cost of living increases. Circumstances, such as the decision in 1931 to reduce the basic wage by 10% during depressed economic times, caused a change in thinking as to the idea of the basic wage being a minimum standard. General notions such as the capacity for the economy (in light of inflation and productivity rates) to pay came into consideration when considering wage increases, along with the idea of a basic or living wage. According to Nyland (1989), the other significant issue dealt with at the federal level has been standard hours of working for employees.

The arbitration system in Australia has influenced greatly wage policy in Australia. Overall, the system has supported centralised wage determination rather than a decentralised process. This system has been under serious threat by developments in recent times.

2.2 Enterprise bargaining

A fundamental change to the industrial relations system in Australia happened in the late 1980s and 1990s. During that period employer groups and conservative political

parties began to press for emphasis to be placed on workplace or enterprise bargaining and a whittling down of the arbitration system (O'Brien, 1994: 468-90).

Enterprise bargaining is a negotiating process which is said to enable individual workplaces to arrive at wages and work conditions more suitable for those enterprises. Such flexibility supposedly creates more flexibility and efficiency at the workplace which in turn will promote greater productivity and international competitiveness.

Enterprise bargaining in essence is concerned with the direct negotiation between an employer and employees (or people acting on behalf of the employees such as unions) regarding the wages and conditions at a particular workplace or enterprise.

It is in direct contrast to the award system developed under arbitration. Whereas the award system creates the same wages and work conditions for every workplace in a particular industry, enterprise bargaining is designed to arrive at an enterprise agreement to specifically fit the nature and requirements of the particular enterprise or workplace.

As alluded to by Creighton and Stewart (2005: 53), the Federal tribunal, the Australian Industrial Relations Commission, when dealing with the National Wage in 1991 and following the urging of the parties, including the Federal government and the ACTU (Australian Council of Trade Unions), agreed to recognise the enterprise bargaining principle subject to conditions. Since then, the Federal Government and the States have

passed legislation recognising enterprise bargaining. In Queensland the relevant legislation is the *Industrial Relations Act 1999.*

In 1993 a Federal Labor government passed the *Industrial Relations Reform Act 1993 (Cth)*, which altered the industrial landscape, by making workplace bargaining the centrepiece of industrial relations. In 1996 a Conservative coalition government made further significant changes by passing the *Workplace Relations Act 1996 (Cth)*. This Act, as its name suggests, places emphasis on settling industrial disputes at the workplace level. One way that the main aim of the Act was to be achieved was by regarding (pursuant to section 3 (d) thereof) national wage increases as part of a "safety net" of minimum wages and conditions, supporting the enterprise bargaining process. Under the *Workplace Relations Act 1996*, a certified agreement overrides an inconsistent award or order of the Commission and inconsistent Commonwealth laws (former sections 170LY and 170 LZ (4)). A certified agreement also overrides inconsistent State laws, awards or employment agreements, with the exception of State provisions dealing with occupational health and safety, workers' compensation and apprenticeships (former section 170 LZ (1) – (3)).

The *Workplace Relations Act* has changed the fundamentals of employment or industrial relations in Australia. Control of employment relations, through general representation of employees by unions and the upholding of the public interest by arbitration commissions or tribunals, has been done away with (Gardner 1997:37-8). In its place is the notion that employment regulation is to be based on a system of bargaining between employers and employees/unions at the enterprise or industry level,

supported by some minimum standards (such as "safety net" wage increases for those not receiving enterprise bargaining increases). In this scenario, the role of the State is confined largely to enforcement of the bargains struck.

2.3 Australian Workplace Agreements

A further alternative to the conciliation and arbitration process has been the creation of AWAs (Australian Workplace Agreements) under the *Workplace Relations Act 1996 (Cth)*.[2] Under the 1996 Act these agreements are registered written agreements made between an individual employer (mainly corporations) and an individual employee, which set out the conditions affecting the relationship between employer and employee. A prominent feature of AWAs is that they operate entirely to the exclusion of any award or agreement made or registered under Federal or State law (section 170 VQ).

The operation of AWAs so far has not been significant in workforce terms, as it is estimated that only about 2% of workers have taken up AWAs (Creighton and Stewart 2005:262).

2.4 Legislative Regulation

This chapter has dealt so far with the general or primary regulation of industrial or employment relations. It is now appropriate to refer to more specific regulation in Australia of the employment relationship, in the form of various "mandates" (obligations created by legislation, courts and tribunals that employers owe to

[2] It should be noted that strictly speaking AWAs are federal instruments only. However, some State laws, including industrial statutes in Western Australia and Queensland, have also allowed the making of registered individual workplace agreements.

employees – Wachter and Wright 1990:243). These, as will be shown later, have caused employers in general to be wary of hiring additional permanent employees and to consider using employees from the secondary labour market.

Unfair dismissal

One particular mandate that has employers concerned is the unfair dismissal laws that have been passed by Federal and State Governments in the last twenty years. In 1972 South Australia enacted section 15 (1) (e) of the *Industrial Conciliation and Arbitration Act 1972 (SA)*, which enabled that State's Industrial Court to hear claims from individual employees of "harsh, unjust or unreasonable" dismissal or termination of employment. Since that time each of the other States and the Federal government have adopted a similar approach in permitting individual claims on like grounds. Relief can take the form of reinstatement to the original job or position or, more likely, damages as compensation for the unjust dismissal.

New South Wales has had unfair dismissal legislation for employees since the *Employment Protection Act* in 1982. Part 6 of Chapter 2 of the *Industrial Relations Act 1996 (NSW)* enables an employee to apply to the Industrial Relations Commission for relief from a dismissal or threatened dismissal that is or would be "harsh, unreasonable or unjust" (section 84 (1)).

At the federal level, the first definitive changes came with the *Industrial Relations Reform Act 1993 (Cth)*, which provided for reinstatement or compensation remedies by the Australian Industrial Relations Commission (AIRC) for cases of unfair dismissal or

termination of employment, where the termination was "harsh, unjust or unreasonable" or infringes certain prohibitions against discrimination. Its successor Act, the *Workplace Relations Act 1996*, continued the concept of unfair dismissal, but limited the coverage of the legislation. The emphasis under the Act, like the State Acts, was to ensure that "'a fair go all round' was accorded to both the employer and employee concerned" (section 170 CA (2)).

In Queensland section 74 of the *Industrial Relations Act 1999* authorises the Queensland Industrial Relations Commission to deal with "unfair dismissal" claims or applications. By section 73 of the Act a dismissal is unfair if it is harsh, unjust or unreasonable, or for an invalid reason (such as discrimination). Of significance for smaller employers, the Act does not contain the small business exemption that once existed in the legislation.

What may be of concern to employers is that, under the unfair dismissal legislation of the States and Commonwealth, the concept of a dismissal has been interpreted quite widely by the Industrial Commissions, according to Creighton and Stewart (2005: 473) They note, for instance, that a concept of "constructive dismissal" has been accepted to include cases where an employee is forced to resign or departs as a result of behaviour by an employer which amounts to repudiation of the employment contract.

Under the Federal Act, the *Workplace Relations Act 1996 (Cth)*, in determining whether there has been termination of employment by an employer, it has been held that there

should be an examination of whether "the action of the employer is the principal contributing factor which leads to the termination of the employment relationship": *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 204-205.

There is normally no dismissal or termination of employment, where an employment contract for a set term expires, without an offer of further employment. This has the result that a casual employee who is not offered further work may be unable to try for reinstatement or compensation: *Pacific Waste Management Pty Ltd v Saley* (1993) 51 IR 339. This feature is an attraction of the secondary labour market for employers in that casual employees such as labour hire workers find great difficulty in accessing the unfair dismissal laws.

What may also be of concern to employers about unfair dismissal legislation is that, in line with the "fair go all around" approach (eg ss.170 CA, 170G (3) of the *Workplace Relations Act 1996 (Cth)*), significant importance is assigned to procedural fairness in terms of giving an employee a reasonable chance to reply to allegations of misconduct. This involves employees receiving adequate warnings before dismissal.

Redundancy

In addition to the remedy of unfair dismissal Federal and State Commissions have recognised that employers have obligations where, through no fault of an employee, an employer "no longer wishes the job the employee has been doing to be done by anyone" (*R v. Industrial Commission of SA; Ex parte Adelaide Milk Supply Co-op Ltd* (1977) 16

SASR 6 at 8). This may be a result of new technology, restructuring or financial considerations.

Creighton and Stewart (2005: 431, 432) observe that, since the *TCR (Termination, Change and Redundancy)* case (1984) 8 IR 34 the issue of redundancy has been considered in most federal awards. At State level where there are less limits on what is contained in awards, redundancy provisions have become commonplace and are reasonably generous. For example in Queensland severance benefits have been increased to a maximum of sixteen weeks pay for 12 or more years of service.

Macken, O'Grady and Sappideen (1997: 189) note that under Federal and Queensland legislation employees made redundant can apply to a commission for severance pay (e.g. under section 170 FA *Workplace Relations Act 1996 (Cth)*). What may be of alarm for employers is that, even in a redundancy situation, an employee may be able to sue for unfair dismissal when not properly consulted before a decision to retrench or when unfairly selected for a redundancy ahead of others, or where the severance benefits are not adequate (Macken, O'Grady and Sappideen, 1997: 189, 327)

Occupational health and safety

Another legislative mandate that has impacted on employer obligations is that relating to occupational health and safety. This statutory obligation is in addition to the common law duty of care placed on employers to look after the health and safety of employees. As noted by Lante Wallace-Bruce (Butterworths, 1999: 122), all the States

and Territories of Australia have elaborate statutory provisions dealing with occupational health and safety.[3]

Occupational health and safety legislation was introduced in Australia, because of the general recognition that the occurrence of industrial accidents in Australia was quite high. The overall objective of the various pieces of legislation is to promote and secure the health and safety of all persons at work.

Prior to the OHS Acts passed in recent years based on the English Robens Report, health and safety legislation in Australia was generally scattered and overly technical. Gardner (1997: 493-4) observes that the first workplace safety legislation was in the form of factory and shop legislation, based on British legislation. These Acts invariably provided for government inspectors and penalties for breach of standards regarding specific matters such as ventilation. Every Government in Australia from 1980 has passed new occupational health and safety laws based on the recommendations set out in the British Robens Report of 1972.

The Robens Report was the first British or Australian inquiry into OHS legislation in its entirety, and it set out the shortcomings of the then accepted system of OHS regulation (Johnstone 2004: 63-66). It sought to impose an overall coherent structure to OHS regulation, instead of the previous fragmentation that existed. According to Johnstone,

[3] The relevant statutes are as follows: *Occupational Health and Safety Act 2000 (NSW); Workplace Health and Safety Act 1995 (Qld); Occupational Health and Safety Act 2004 (Vic); Workplace Health and Safety Act 1995 (Tas); Occupational Health, Safety and Welfare Act 1986 (SA);* and *Occupational Safety and Health Act 1984 (WA).*

the same objections could have been raised regarding Australian statutes operating at the time of the Robens Report.

The two prime objectives of the Robens Report were laid down in paragraph 41 of the report. First, one main objective of reform was to be "the creation of a more unified and integrated system to increase the effectiveness of the state's contribution to safety and health at work". The second more controversial objective was "a more effectively self-regulating system", which called for "the acceptance and exercise of appropriate responsibilities at all levels within industry and commerce".

The first objective necessitated reducing or eliminating the existing legislative provisions into one Act of Parliament (Robens Report 1972, p. 40, para 125), and putting the agencies supervising the legislation under one management (1972, p.35, para 110). It was considered that future regulation should be simpler in style, and as far as possible be limited to laying down general requirements.

By way of contrast with the previous Australian legislation that emphasised penalties for contravention of specific offences, legislation in Australia based on the Robens style laid more emphasis on more general responsibilities of the parties to prevent injury and disease (Creighton and Stewart, 2005: 591, 592). The general responsibilities or duties are owed to anyone reasonably likely to be hurt by a lapse in that duty, and can be owed by a range of persons from employers and employees to occupiers of premises, manufacturers, and suppliers of plant. Breaching the duty creates the offence.

On the issue of a self-regulating system, the report aimed for a situation whereby at workplace level, workers and management would idealistically work together to achieve and improve upon the required standards of health and safety (through workplace committees and so on). This involved a statutory duty on every employer to consult with employees or their representatives at the workplace on measures for promoting safety and health at work.

Most of the report's recommendations were first introduced into the British arena in 1974, and have been taken up by all Australian jurisdictions. Acts such as the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)*, the *Occupational Health and Safety Act 1983 (NSW)*, and the *Occupational Health_and Safety Act 1985 (Vic)* were passed, the latter two Acts being replaced by recent legislation of the same name in 2000 and 2004 respectively, (Creighton and Stewart, 2005: 589, 590). In Queensland the *Workplace Health and Safety Act 1989* was passed, which has been revised and strengthened in a 1995 Act of the same name.

The Occupational Health and Safety (OHS) legislation in Australia imposes a general duty (in Queensland an "obligation" under section 28 of the *Workplace Health and Safety Act 1995)* upon employers in relation to the health, safety and welfare of their employees. The statutes also place duties on employers and self-employed persons in relation to persons other than employees, who might be exposed to workplace hazards, such as persons visiting the workplace.

Under the legislation, employers owe to their employees a statutory general duty of care to provide a safe working environment. This duty on employers is created as an absolute duty, modified only by the limitation of what precautions were reasonably practicable in the circumstances.

In Queensland formal enforcement methods under the legislation include improvement notices, prohibition notices (requiring work to cease until a hazard is abated) and infringement notices (on the spot fines). Inspectors generally have a broad discretion as to the enforcement methods they adopt. A key issue in enforcement has been whether inspectors should enforce obligations by formal resort to criminal sanctions, or seek compliance through advisory and persuasive methods.

Workers compensation

A legislative mandate with a longer history than that of OHS is the workers' compensation system that operates in all Australian States and Territories. This is a "no fault" scheme of accident insurance for work injuries, funded by premiums paid by employers.

According to Johnstone (2004: 47-56), in the nineteenth century, notwithstanding that an employer's duty of care to employees had been acknowledged from the eighteenth century, it was very difficult for employees injured at work to obtain compensation through the courts, because of the available defences to an action for negligence (namely, the doctrine of common employment, voluntary assumption of risk, and

contributory negligence). In time there was acknowledgement that employers were better placed than employees to carry the costs of workplace injury or disease, or in part to transfer those costs to persons utilising the employers' goods and services.

Germany in 1884 was the first country to introduce a worker's compensation scheme, and a *Workmen's Compensation Act* was subsequently passed in Britain in 1897. The British Act was adapted by each of the Australian States to the local circumstances. Queensland passed Acts in 1905 and 1916. The present Queensland Act is the *Workers' Compensation and Rehabilitation Act 2003 (Qld)*.

It appears (Johnstone, 2004: 60-63) that from the mid 1970s employers started to voice concerns about increasing wages, which were forcing up labour costs and increasing workers' compensation premiums. The result was that from the mid 1980s workers' compensation schemes were radically changed, by for example the tightening of eligibility for benefits, severely reducing or abolishing access to common law damages (except in Queensland), and emphasising rehabilitation.

A common problem for the State workers' compensation schemes is a dilemma between continuing rises in premiums paid by employers or cuts in the benefits available to injured workers (such as abolishing common law claims to damages).

Unlawful discrimination

Another form of regulation or mandate imposed on employers in Australia in the last 30 years is that concerning discriminatory practices against individuals. Since the 1970s,

all Australian States and the Commonwealth have introduced legislative provisions intended to prevent discrimination in employment (and in other situations) on the grounds of race, sex or physical or intellectual impairment. The statutes prohibit discrimination in deciding inter alia to whom offers of employment should be made, in the arrangements of employment or in the dismissal of a worker from employment.

Direct discrimination against a person is said to take place when a person treats a second person with, for example, an impairment, less favourably than he or she would treat a person without an impairment. Indirect discrimination extends to actions that involve a person requiring another person as a member of a group with certain attributes (for example an impairment) to conform to a requirement or condition, to which the other person cannot conform, which is unreasonable and to which a substantially larger share of persons outside the group are able to conform.

It appears that these directives against discrimination on the grounds of impairment (such as in the *Disability Discrimination Act 1992 (Cth))* would not permit an employer, where there is a potential work hazard to an employee with an impairment to remove the employee from the workplace. The hazard itself would have to be removed, though not threatening the health and safety of other employees.

The anti-discrimination legislation in general contains exceptions, which grant a defence to an employer on the basis that discrimination was necessary because of statutory requirements, or because of health and safety.

Commonwealth and State legislation restricts the freedom of employers to refuse to employ someone for reasons apart from disability such as race and sex. For example, at the Commonwealth level there is the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*, relating to discrimination on the grounds of race, sex, marital status or pregnancy.

Most States have passed comprehensive anti-discrimination legislation. For example the *Anti-Discrimination Act 1991 (Qld)* is very widely drafted, setting out almost every ground of discrimination covered in the Federal Acts.

It would seem that each of the Anti-Discrimination Acts has a similar procedure for handling complaints. A complaint may be made by a person (for example an employee) on his or her own behalf or on behalf of others. The complaint is investigated by the relevant officers and endeavours are made in the first instance to resolve the matter through conciliation. If that fails, the complaint can be heard and determined by a tribunal which hands down a decision on the matter. It should be noted, also, that the relevant statutes deal not just with discriminatory conduct, but with allegations of harassment or vilification at the workplace.

Companies in practice may wish to discriminate against some candidates because they are thought to be inappropriate for the workplace but the companies are fearful that as employers they could be liable under anti-discrimination legislation and unfair dismissal laws.

2.5 Summary

The preceding description of the development in employment relations in Australia shows that over the last century there has been an increase in the legislative responsibilities or mandates placed on employers generally in Australia arising from workers' compensation, workplace health and safety, anti-discrimination and unfair dismissal legislation. This is in addition to the more standard legal responsibilities on an employer, such as the duty of care towards an employee and payroll and leave obligations.

It will be shown that the preceding analysis, of the development of various types of employment regulation, ties in with analyses on the growth of legislative employment mandates in North America. According to commentators there this growth has caused employers to go to less regulated or unregulated labour markets such as labour hire which offer the prospect of escape from the employment mandates.

Chapter Three

Tensions with Traditional Principles

3.1 General Theoretical Difficulties

It is considered that Australian courts have not directly confronted recent developments in labour hire, and the analytical underpinnings of labour hire. Rather than seeking to change or reform traditional employment law principles to accommodate labour hire, the courts generally have sought to deal with labour hire, through the prism of conventional common law employment principles.

It is because of this traditional focus of the courts, that the purpose of this chapter is not to engage in close legal analysis of contemporary cases, but to illustrate the proposition that labour hire runs counter to the traditional employment tests and principles. Most attention therefore will focus on the problems and anomalies associated with the courts' application of traditional employment principles to the labour hire situation generally. The cases discussed are examples of the tensions between labour hire and common law principles, especially where labour hire is used to evade traditional employment responsibilities.

It is contended that the triangular nature of the labour hire relationship creates problems with allocation of risk and legal responsibility, which are not satisfactorily recognised or resolved by the law, in that there are two parties, the agency and the client, and both

assume or split the traditional functions of an employer. For example, the labour hire agency pays the wages of labour hire workers and has a contractual relationship with them, while the client controls or directs the worker in the carrying out of work at the client's premises. Employees find themselves interacting with the two parties, each of whom assumes certain functions of a traditional employer. It is considered that this separation of control and functions between an agency and client can give rise to legal issues, in that the area of labour hire employment is not specifically regulated but is subsumed under common law contract of employment principles (particularly the control test). Explicit judicial support for this view was expressed by Marks J. in *Workcover Authority of New South Wales v. Swift Placements Pty Limited [1999]* NSWIR Comm 113 at 131 as follows:

> An alternative approach is to state that the circumstances created by the use of labour hire do not comfortably fit within orthodox concepts of control developed by the courts over many years to deal with what were then contemporary orthodox employment relationships or variations on them.

The fieldwork findings of this study will show that the virtual lack of regulation of labour hire has encouraged greater use of labour hire. The findings also will show that the prime factor of the regulation of the standard employment relationship has enhanced the attraction of labour hire, in that it allows business to devolve the risks connected with direct employment. This advantage has been adverted to also in the New South Wales Labour Hire Task Force Report (2001:16). Labour hire in light of the empirical findings is perceived as taking away significant legal responsibility associated with an employer at law, particularly with respect to unfair dismissal laws, payment obligations, vicarious liability, workers' compensation and payroll tax liabilities.

3.2 Identification of the "Employer" for the purposes of liability

A basic legal problem that arises with labour hire is that it is difficult to classify it according to the standard rules relating to contract of employment principles. The triangular nature of labour hire can lead to a blurring of legal obligations, and confusion as to the identity of the "employer". Possibly because of this it is difficult to determine where legal liability should rest in some labour hire cases. For instance there would appear to be problems applying common law principles to labour hire situations involving unfair dismissal of workers, the vicarious liability of a labour hire employer, the application of anti-discrimination legislation, and occupational health and safety issues. As noted by the New South Wales Labour Hire Task Force (2001:43), there has been an inconsistency in case law in defining the nature of the relationship between parties in a labour hire arrangement. This exercise depends on the particular circumstances of each case, with the degree of direction or control over the worker being the dominant factor.

As Bornstein (2004:54) and Hall (2002:4) have noted, a fundamental quality of a labour hire arrangement is the splitting of contractual and control relationships in the arrangement. In this regard labour hire arrangements cause tensions in legal employment theory in respect to the present tests for the existence of an employment relationship. The labour hire agency, while paymaster and general overseer, in practice has no day-to-day control of the labour hire employee and yet is the employer. The host/client has day-to-day control over what is done, how it is done, and the hours of work but has no legal relationship with the employee (because of no intention to create a legal relationship and no offer and acceptance between the parties). However, just as

in the traditional employment situation, the test applied by the Courts to determine a labour hire employment arrangement is the multiple factor test, with prime importance placed on the right to control the manner of work of the employee (as stated by Mason J. in the High Court case of *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and endorsed by the High Court in *Hollis v. Vabu* (2001) 107 CLR 21).

Other factors taken into account in determining an employment relationship as shown by the two cases include the mode of remuneration, the hours of work, the deduction of income tax, the capacity to delegate or subcontract, the provision of tools, the requirement of exclusive service, and organisational integration, as shown by the use of uniforms or badges. In the *Stevens* case men had been involved in the felling and delivery of trees for a sawmilling company. The issue in that case was whether those men were the employees of the sawmilling company, so as to render it vicariously liable for the negligence of one of the men in the loading of logs on a truck, which caused injury to another of the men.

In an attempt to rationalise the control test in relation to labour hire, the Courts, as in *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* (2000) 196 IR 69 have come up with what has been termed the "ultimate control" test, via the use of contractual arrangements with the agency and client and with the client and worker, whereby for example in consideration of payment by the agency a worker would agree to undertake work under the direction and supervision of the client. This test would appear to be a gloss on the High Court's right to control factor. That the standard

control test as applied to the labour hire situation is under strain can be shown by judicial opinion that clearly queries whether the control test is an outdated notion for some relationships such as labour hire (as suggested by Kirby J. in *Pitcher v. Langford* (1991) 23 NSW LR 142 at 150).

Apart from the difficulty of applying the standard employment control test to a labour hire situation, there are other signs that a labour hire employment arrangement should be treated differently from the traditional employment situation. For instance, one of the indicia that has been used at common law (particularly in England) to point to a contract of employment has been the mutual obligation to maintain the employment relationship by both parties. A traditional employment contract envisages a situation where the employer has an obligation to provide work, and the employee has an obligation to accept work. In labour hire situations the employee is usually under no obligation to accept or take on a particular job or work.

McDougall J. in *Forstaff v. Chief Commissioner of State Revenue* (2004) NSWSC 573 considered the decision of the House of Lords in *Carmichael v. National Power plc* [1999] 4 All ER 897 where it was held that, because the arrangements between the parties imposed no obligation upon one to provide any work or the other to undertake it, there was no contract of employment between the parties. If that English case represented the law in Australia, it would be difficult to maintain that someone who was merely on the books of a labour hire company could be its employee, in view of the circumstance that generally there is no obligation on the part of any agency to provide work to a person on its books (the ability of an agency to supply work being dependent

on demand), and no obligation on the part of a person listed with the agency to accept an offer of work.

McDougall J. reformulated the common law mutual obligation test along the following lines to read that:-

> The mutual obligation test should be expressed, not as an obligation on the one side to provide and the other to perform, but as an obligation on the one side to perform work (or provide service) and on the other side to pay.

Accordingly, in McDougall J's view, in the labour hire context a contract of employment between an agency and employee only comes into existence, when the labour hire agency offers work to the employee and the employee accepts the offer. Prior to that there is no mutuality of obligation and no employment relationship.

A more fundamental concern however with the labour hire relationship is that, as noted in the New South Wales Labour Hire Taskforce Inquiry (2001), there remains confusion as to the nature of the employment relationship and the labour hire, and disputes have arisen as to who should be considered the responsible employer in certain situations. This is despite the fact that the concept of a labour hire arrangement should be well and truly settled. Various cases can be quoted to illustrate a continuing uncertainty in this regard. In *Mischeva v. Spicers Paper Ltd* (1998) 44 AILR 3-904, where there were unfair termination proceedings before the now defunct Industrial Relations Court of Australia, at an early stage the judicial registrar took the view that both the labour hire agency and client organisation were the employers of the labour hire employee. It was

only later when the agency conceded that it was the employer, that the employer issue was resolved.

A further example of confusion even at judicial levels occurred in *Drake Personnel v. Commissioner of State Revenue (Vic)* (2000) 44 ATR 413 where the Victorian Court of Appeal, dealing with the issue of employer liability for payroll tax under the *Pay-Roll Tax Act 1971 (Vic)*, held that Balmford J. the judge at first instance had misapplied the control test to a labour hire situation. Balmford J. had looked at the particular labour hire situation, and held that the temporary workers were not employees of the labour hire agency on the basis of the traditional common law employment test, as the Drake agency had no day-to-day control over the worker. In so doing the judge illustrated the tensions or difficulties that arise in attempting to automatically apply common law employment tests to labour hire.

Balmford J at first instance ((1998) 40 ATR 304 at 312) noted the approach of Mason and Brennan JJ in the *Stevens v. Brodribb* case, of treating the degree of control exercised by one person over another as a prominent factor in an employment relationship. In the case before her the evidence was that the temporary workers were to do the work required by the client, in a manner required by the client. On this basis in the judge's view the day to day control according to the common law approach resided with the client, and not with the Drake agency. As the Drake agency did not have the day to day control over the way in which the temporary workers performed work whilst with the client, it could not be the employer of those workers.
However the Victorian Court of Appeal took the view that the contract between the

Drake agency and a temporary worker should not be denied its character of employment. It considered that an immediate benefit to the client by the worker was no bar. The client's day-to-day control could be referred back to the contract between Drake and the temporary worker under which the temporary worker accepted direction from the client. By so doing, the Court of Appeal would appear to have added an accretion to the existing High Court test, by setting up what they referred to as an "ultimate control" test in that particular case, whereby control is maintained through the terms in the separate agreements with the worker and the client company (such as for example the requirements on a worker to use his or her skills properly or face discipline, and to undertake work under the direction and supervision of the client). This test has been referred to also in *Swift Placements Pty Ltd v. Workcover Authority of NSW* (2000) 96 IR 69. By its approach the Court of Appeal has qualified the common law employment control test with respect to labour hire situations. The practical result in the case was that the Drake agency was held liable under the *Payroll Tax Act 1971 (Vic),* as the employer who paid the worker's wages.

Confusion as to the identity of the employer in a labour hire situation can also occur where a party endeavours to escape from obligations under a statute. The South Australian case of *Mason & Cox Pty Ltd. v McCann* (1999) 74 SASR 438 is a case in point. There an anomalous situation arose in that the client ironically argued that it and not the agency was the employer of the labour hire worker, and that, as a consequence, it could not be sued by the worker as its employee for damages for negligence pursuant to the *Worker's Rehabilitation & Compensation Act 1986 (SA).* Under that Act an

employee's common law rights against an employer were excluded, but the entitlement of a worker to bring common law proceedings against third party wrong doers were maintained. To add to the confusion the labour hire worker had already received workers' compensation payments on the basis that it was accepted that the worker was employed by the agency.

As noted by Crawley (2000:1-6) identifying who was the labour hire employer in the case for the purposes of the Act was of fundamental importance in determining liability. As in a typical labour hire situation the agency in the case in no manner supervised the work done by the worker. However it paid the worker, made superannuation contributions on his behalf, deducted tax from his wages, and also paid workers compensation premiums and payroll tax on behalf of its workforce.

The Full Court of the Supreme Court of South Australia unanimously held that the agency was the legal employer, and that there was no contractual relationship between the client and the worker, either express or implied. It was held that the fact of control by Mason & Cox over the employee at their premises alone cannot have led to a conclusion that there was a contract of employment between the employee and Mason & Cox, or indeed that there was a contractual relationship at all. Doyle C.J. (at p.443) stated that what mattered was the legal right to control, rather than the practical fact of control. In the final result the court dismissed the appeal against the trial judge's decision awarding $120,000 damages against the client. Crawley (2000:1-6), notes that the *Mason & Cox* case is an example of a business being in a worse position under legislation by using the less regulated option of labour hire than if it had employed the

employee under standard guidelines, in view of its liability for common law damages under legislation.

Labour hire can also be used by an organisation to conceal an existing employment relationship with a worker, and so circumvent its legal obligations. In such a situation there can still be basic argument and confusion over who is the employer of the worker in proceedings. However, even where there is express documentation setting up a labour hire arrangement, if the documentation is not consistent with the real nature of the arrangement, a court may hold that there is an employment relationship between the worker and the client organisation. A labour hire agency may only be a conduit and the host/client organisation, previously the employer, still may be liable as employer for unfair dismissal purposes: *Oanh Nguyen v. A-N-T Contract Plumbers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd.* (2003)128 IR 241. In that case the employee was engaged by the Thiess company, who had contacted the employee directly and had created formal documents stating that the labour supplier, A-N-T, was the employer. Apart from organising workers' compensation, A-N-T had little contact with the employee, who was a union delegate at the worksite and who also participated on bodies such as the Thiess's Occupational Health and Safety Committee.

The employee became pregnant, but concealed the fact for some weeks before indicating her state to Thiess. The Thiess company arranged for the woman to undertake a medical assessment which cleared her for work generally but not for the performance of certain tasks. The Thiess company subsequently stopped the employee

from continuing to work on the basis that her services from the A-N-T Agency were no longer required.

The employee commenced unfair dismissal proceedings against Thiess and A-N-T. The A-N-T agency asserted that it was the employer but that it had not dismissed her. It alleged that it had work available for the employee following her termination at Thiess, and accordingly she had not been sacked.

Thiess was ultimately held to be the legal employer by the New South Wales Commission, who had to take into account all the factors relevant to the case. On the one hand it had to consider the control that Thiess had over the worker's recruitment, employment and termination, which was a significant factor. On the other hand it had to take into account the A-N-T agency's role in paying wages and organising compensation. The Commission reached the conclusion that it was dealing with an "atypical" labour hire relationship, and found that A-N-T was used as a mere "conduit" by Thiess to pay their employees' wages and deal with on-costs such as workers' compensation. The result was that Thiess had to pay the employee for 15 weeks pay and compensation. The case is yet another example of how the labour hire arrangement is used by organisations in an attempt to circumvent their legal obligations as an employer.

A similar situation occurred in *Damevski v. Guidice* (2003) 202 ALR 494, where a cleaner was informed that he would no longer be employed directly by the organisation, but instead he would be hired through an agency. The worker signed a document from

the organisation indicating his acceptance of the offer of work from the agency, after an assurance that "nothing will change" and on pain of not being offered further work otherwise.

The Full Federal Court held that the worker was still an employee of the organisation, and so could pursue a claim for unfair dismissal against it. Justice Wilcox in the case considered that the whole point of the agency's intervention was to effect an arrangement, that would enable the organisation to avoid some of its employer obligations.

The circumstances of the *Nguyen* and *Damevski* cases are similar to those of the American case of *Vizcaino v. Microsoft* 120 F.3d 1006 (9th Cir. 1997), where long term "contractors" worked under the direct supervision of Microsoft managers on software products essential to the company's core business. The workers were treated by Microsoft as "temporary non-employees" and denied company benefits and other rights available to traditional employees that were doing similar work. The Circuit Court of Appeals found that the workers were employees of Microsoft and not of the agencies, and therefore entitled to participation in the company's stock purchase plan. The case is an American example of how an organisation will not be permitted to evade its employer's responsibilities by merely interposing an entity that performs managerial tasks such as issuing pay slips, collecting tax and arranging for worker's compensation insurance. According to Gonos (2005:302) the case drew attention to staffing industry practices.

Notwithstanding the preceding, there may be no circumvention of employer obligations, where a worker is placed with a host business for a lengthy period, and there has been little involvement by the agency. In this situation the original labour hire contract between the agency and worker may become superseded by a direct agreement by the worker with the host, where a worker, once assigned to the host, virtually has no contact at all with the agency: *Melbourne v. J.D. Techforce Pty Ltd* (1998) 65 SAIR 372 at 390-1.

Another conundrum with respect to labour hire, as regards evasion of regulatory responsibilities, is that even when a labour hire arrangement is used, a labour hire agency can avoid the statutory responsibilities of an employer and can contract out of minimum employment standards contained in awards and collective agreements, by taking advantage of the legal distinction between employees and independent contractors. As has been noted, in so doing an agency relies on the courts' deference to the apparent form of a contract (Fenwick, 1992:238). The leading example of this form of labour arrangement is the case of *Building Workers' Industrial Union of Australia v. Odco Pty Ltd* (1991) 29 FCR 104 (the "Troubleshooters" case). In that case the agency ODCO supplied labour to the building industry in Victoria.

As to the circumstances of the case there was firstly a written contract between the worker and agency which acknowledged the following –

- there was no relationship of employer/employee, the worker was self-employed and not bound to accept any work;
- the worker agreed to work for a fixed rate;

- the worker's personal insurance was the responsibility of the worker;
- Troubleshooters was forbidden to make deductions in respect of pay as you go (PAYE) taxation;
- the worker had no right to holiday pay, sick pay, or long service leave;
- Troubleshooters had no liability or responsibility, other than to pay the worker in accordance with condition two above;
- the worker guaranteed the work done against faulty workmanship and covered the work for all insurance;
- the worker had to be a member of the trade union covering the worker's trade;
- the worker would provide all the relevant equipment.

A second agreement involved a standard commercial arrangement, whereby under a written contract between the agency and the client the agency would supply labour to the client on request.

It was held by the Full Federal Court that the first contract between the agency and the worker was not a contract of service, that is a contract of employment, but was a contract with the worker as an independent contractor for services. Further, there was no contract of employment nor contract of any kind between a builder and a worker provided by Odco, because there was no promise of payment by the builder to the worker and no intention to create legal relations. The Court pointed to the lack of any control normally held by an agency in a labour hire situation. The Odco company, in supplying labour hire workers to the building industry, was not the legal employer of

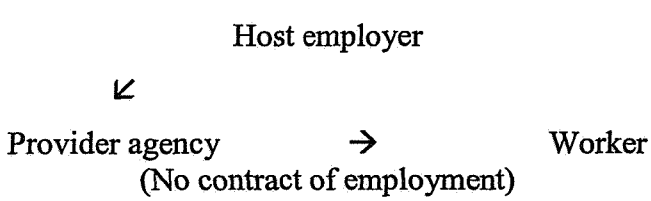
the workers. The overall result was that the workers, who were hired out by the agency, were not the employees of either the agency or client, but independent contractors not covered by industrial instruments or employment legislation. The labour hire agency thus for example could avoid the occupational health and safety duties of an employer, by hiring out the staff in the form of independent contractors.

The Court stated (at p.125) :

> It is easier to impute the requisite degree of control, in the sense of the right to exercise it, to a putative employer who maintains a body of workers paid by the week, whom he leads or charges out by the day to contractors or others requiring work to be done ... the relationship between these labour hire firms and the workers whom they make available is one of employer and employee. In our view there was no reservation of a power in Troubleshooters to require one of its workers to move from one site to another, or to work beyond the initial agreed day, sufficient to prevent the imputation of a right to control that worker which would satisfy the test enunciated by Mason J. in *Stevens v. Brodribb.*

Stewart (2002:20) notes that the *Odco* case illustrates the fact that, while an agency worker is not an employee of the client for whom he/she performs services, it does not follow that the worker is necessarily employed by the hire agency. The Troubleshooters agency engaged and paid workers in respect of whom it claimed that it exercised little control over their work. The agency lent them out to clients who, though closely supervising their work, had no contract with the workers and hence could not be their employer. The result was that no one was the legal employer of the workers. Unlike the standard labour hire system, there is no legal relationship between the worker and service provider. The arrangement can be illustrated as follows –

ODCO system



The *Odco* case can be considered another form of statutory evasion, just like a labour contract with a private company or partnership formed by a worker under which there can be no employment relationship: *AMP v. Chaplin* (1978) 18 ALR 385 at 391-2. *Odco* arrangements bring about independent contracting arrangements where workers are neither employees of the labour hire agency nor that of the agency's clients.

The Australian decision in the *Odco* case is in line with a previous English decision of *Construction Industry Training Board v. Labour Force Ltd.* [1970] 3 All ER 220. There Labour Force, a labour hire agency, supplied workmen to a building contractor. As to the relationship between Labour Force and the workmen, the Court held that a contract "sui generis" existed between the parties on the basis that the workmen were contractors rendering services exclusively to the other party.

The decision was based on the circumstances that Labour Force had no control over the work of the workmen, there was no continuity of contract, no sick pay and no bar on the workmen working for others when they liked. The building contractor also was held not to be the workmen's employer because he did not pay them, but communicated the number of hours worked to the labour hire agency who then was responsible for the payment of the workers. The upshot of the decision was that the labour hire agency,

Labour Force, did not have to pay the industrial training levy calculated on the basis of the payroll.

In cases such as the *Odco* case and the *Labour Force* case, it could be argued that by classifying certain labour hire arrangements as contractor situations, the Courts have encouraged the short circuiting by businesses of employee-protection legislation, of the terms under awards and collective agreements and of common law principles designed for the protection of individual employees.

By way of counter-balance, it should be noted that the New South Wales Labour Hire Task Force in its final report (2001) observed (at page 6) that the number of contractors in the labour hire sector is relatively small, being less than 1% in an AIG (Australian Industry Group) survey. In addition, there are legislative provisions such as section 275 of the Queensland *Industrial Relations Act 1999*, whereby a contractor not truly independent but mainly reliant on one party for work can be deemed to be an employee for industrial protection purposes.[1]

Under section 275 of the Queensland Act, the Commission is granted the power to declare persons who perform work in an industry under a contract for services to be employees, if it considers that such persons would more appropriately be regarded as employees. In considering whether to make such an order, the Full Bench of the Commission may consider –

- the relative bargaining power of the class of persons;

[1] It should be noted that the deeming provisions of s.275 of the Queensland Act have now also been sterilised for most employers by the federal *Independent Contractors Act 2006 (Cth)*.

- the economic dependency of the class of persons on the contract;
- the particular circumstances and needs of low paid employees;
- whether the contract is designed to, or does, avoid the provisions of the Act, an industry sector order or an industrial instrument;
- the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers;
- the consequences of not making an order for the class of persons.

By way of example section 275 was applied in *ALHMWU v Bark Australia* [2001] QIR Comm 22. There the Queensland Industrial Relations Commission deemed security guards to be employees where they had been designated as independent contractors under an agreement, so as to deprive them of the entitlements such as annual leave and overtime payments under an award and certified agreement.

There have been ongoing cases however where businesses attempt to set up labour hire workers as independent contractors. In this way both client organisation and labour hire agency seek to avoid the burden of employment regulation. As observed by Collins (1990: 354) where the management of a business can turn an employee into a contractor, it thereby substitutes a commercial contract for one of employment relations. An example of the trend is the South Australian case of *Country Metropolitan Agency Contracting Services Pty Ltd. v. Slater and WorkCover/CGU Workers Compensation Insurance (SA) Pty Ltd.* [2003] SAWCT 57, where the Full Bench of South Australia's Worker's Compensation Tribunal upheld the ruling that a labour hire worker under an

apparent *Odco* style independent contracting system was an employee rather than a contractor, for the purposes of the South Australian *Workers' Rehabilitation & Compensation Act 1986.* As the employee Slater was an employee of the Country Metropolitan agency for the purposes of the Act, she could bring a worker's compensation claim against that company.

In the case the applicant worker had been engaged as a tomato picker by the Country Metropolitan Agency (CMACS), which had described itself as an agency contracting service, to work on a tomato growing property run by Chiquita Brands Adelaide Pty Ltd. Her work there was the result of a contractual arrangement between her and the agency, following the worker's response to an advertisement by the agency. After Slater injured her wrist while working, the agency told her that they no longer required her services. Slater was held to be an employee of the agency at first instance and this decision became the subject of appeal.

The CMACS labour hire agency had argued that under the terms of the agreement with Slater it had no contractual relationship as an employer with Slater but that she was self employed; that the worker had agreed to work for an hourly amount for on-site hours; that the agency was not allowed to make PAYE tax deductions; that the worker agreed that she had no claim in respect of holiday pay, long service leave or sick pay; that the worker had guaranteed against faulty work and had agreed to cover the work for public liability, accident insurance, long service leave and holiday pay; and that the worker had agreed to supply her own equipment. The labour hire agency maintained that it had

simply supplied Slater to a third party such as Chiquita, the client/ "host employer" in the case to pick tomatoes.

The Full Bench of the Tribunal upheld the finding at first instance that, despite the fact that Slater had signed a contract stipulating that she was an independent contractor, the indications were that Slater was an employee. In looking at the facts of the case, the Tribunal took the view that Slater was an unskilled labourer with no capacity to delegate and who apart from her gloves, supplied nothing but her labour. These indicators pointed to an employment relationship. In addition the agency had the ultimate authority to direct the employee and had delegated this control to Chiquita.

In considering the agency's submission that parallels ought to be drawn with the decision in *Odco Pty Ltd v. Builders' Workers' Industrial Union of Australia* ("The Troubleshooters" case), the Tribunal took the view that the Troubleshooters case was a special case in respect of the building and construction industry which generally concerned skilled tradespersons. Accordingly, the Troubleshooters case was not a binding precedent. The case accordingly cast doubts on the general applicability of *Odco* style contractor arrangements in various situations.

The Country Metropolitan Agency case is another demonstration that courts, whilst inclined to accept the formal terms of a contract, will not automatically accept the label given to a party under a contract. The case is a reminder that courts and tribunals will look at substance over form in determining the true nature of a contractual relationship.

At common law it is well settled in Britain and in Australia that the label parties attach to their contracts will not determine the true nature of the relationship. While express declarations can be regarded as helpful, especially in doubtful cases, a court will look at the remaining circumstances including implied terms, to classify the contract according to the reality of the situation.

In the English case of *Young & Woods Ltd v. West* (1980) IRLR 201 the Court held that the label of self-employed given to a worker was a sham, given that fellow workers doing essentially the same job were engaged as employees. In the Australian case of *Narich v. Commissioner of Pay-roll Tax* (1983) 50 ALR 417 the Privy Council held that, notwithstanding that a term of the agreement between Narich and the lecturers provided that the lecturers were not employees of the company but were independent contractors, the effect of the contract as a whole, which contained details as to the manner in which the lecturers were to perform their contracts, created an employer-employee relationship under a contract of service.

Justice Gray of the Federal Court of Australia in *Re Porter* (1989) 34 IR 179 reinforced this substance over form approach, when he stated:

> a Court will always look at all the terms of the (employment) contract to determine its true essence and will not be bound by the express choice of the parties as to the label attached to it ..... the parties cannot create something which has every feature of a rooster but call it a duck and insist that everybody else recognise it as a duck.

At the highest judicial levels in Australia too, it would seem that there has been an approach to characterise a work relationship as one of employment by looking at the

economic reality of the work relationship. The High Court in *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 dealt with the question of whether a company was vicariously liable for one of its bicycle couriers, who knocked down the plaintiff on a Sydney footpath. The Court held by majority that the bicycle couriers, while described in their contracts as independent contractors, were in fact employees, and thus found the company Vabu to be liable vicariously. In so doing they endorsed the multi-factor approach of Mason J. in the *Stevens v. Brodribb* case ((1986) 160 CLR 16). The factors that influenced the majority judges in finding an employment relationship were that the couriers were "not providing skilled labour or labour which required special qualifications"; that they had "little control over the manner of performing their work"; that the couriers were "presented to the public and to those using the courier service as emanations of Vabu" in the wearing of uniforms with a corporate logo; and that their finances were "superintended" by Vabu.

The fact that the couriers supplied their own bicycles was not regarded as influential, "because the capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation out of work time". The overall view in the joint judgment was that "viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations" (p.41).

As noted by Stewart (2002: 17), cases such as *Hollis v. Vabu* demonstrate that there can

be legal problems for organisations, that hire out workers and label them as contractors where there is an attempt to maintain substantial control over the workers. In light of the Vabu case, it would seem that even a carefully drafted contract by lawyers may not be sufficient to create a contractor situation (Stewart 2002: 17).

The preceding situations support the view that, as Lobel (2003:121) contends, the traditional common law employment test is difficult to adapt to the triangular employment relations of labour hire. Apart from general problems as to the identification of the employer and the classification of a worker under a labour hire arrangement, the fractured division of control and responsibility in the tripartite labour hire arrangement can create legal and practical problems in specific areas. Problems can arise with respect to OHS, the termination of a worker's services, vicarious liability for a labour hire agency, anti-discrimination provisions, and coverage by industrial instruments. These issues will be dealt with in turn.

3.3 Risk Apportionment in OHS

The essential problem with workplace health and safety responsibilities in a labour hire situation is that a labour hire relationship differs in nature from a normal employment relationship. A labour hire agency as employer does not supervise the tasks that its labour hire employee performs, or control the workplace where they are carried out.

It has already been noted that each of the Australian OHS (occupational health and safety) statutes imposes a duty upon employers in relation to employees. Australian OHS statutes also impose a duty of care upon employers or self employed persons in

relation to non-employees. If workers are employees of a labour hire company, that company owes the workers a general duty of care under the employer's statutory general duty to employees. A client company in turn owes a duty to them as non-employees. This OHS obligation on a client company to some degree cuts out the benefit of using labour hire for client organisations.

As OHS legislation applies to both the labour hire agency as employer and client company as an employer and an occupier of workplace premises, it is the only legislation specifically dealing with labour hire, and as such represents the most developed approach to labour hire up to the present time.

As Hall points out (2002: 5), the complex legal nature of labour hire arrangements is problematic for determining liability, where there has been a breach of OHS legislation. For example, a labour hire worker may be injured and both the labour hire agency and client company may each dispute responsibility. The OHS area is another example of risk apportionment under labour hire. Under risk management theory it has been argued that, for the sake of efficiency, risk should be allocated to the party better able to sustain the cost associated with any particular risk (Stiglitz, 1987: 50).

Difficulties arise with respect to labour hire, because the legal obligations under the *Workplace Health & Safety Act 1995 (Qld)* (which reinforce the common law duty of care) are general and rely on a shared and overlapping liability approach, and thus there can be an uncertain cut off point with respect to the division of OHS responsibility

between an agency and client. As is the case under the legislation of other States, both a labour hire agency and a host employer/client have a duty under that Act to ensure that labour hire employees, who are on-hired to a host employer, are provided with safe place to work, and are not put at risk of injury.

There is thus scope for confusion and uncertainty over the respective roles of an agency and client company, and the allocation of risk and responsibility. This may mean that labour hire employees may be brought onto sites not properly trained, and lacking the organisational knowledge and the work skills associated with the safe carrying out of work procedures. Evidence to this effect was received by the Inquiry into Labour Hire Employment in Victoria (2005:83), and by the Commonwealth Government Inquiry into independent contracting and labour hire arrangements (2005:77). This uncertain division of responsibility between agency and client has the potential for obfuscation, deliberate or otherwise, of OHS obligations. This view is supported by a finding in the United Kingdom, that the sharing of OHS responsibility between agency and host company is a significant problem (Storrie, 2002:50).

Because of the lack of precision over the parties' respective roles, there is a tendency for "buck passing" of responsibility between the parties. As demonstrated in the empirical findings, this is illustrated by the use of disclaimer of responsibility clauses by agencies, and the use of "hold harmless" clauses by client bodies. The latter clauses (usually of an indemnity nature) represent an attempt by client bodies to transfer the financial responsibility to an agency and seek reimbursement for the costs of any OHS breaches by the clients. There is some survey evidence that indicates that 45% of RCSA

(Recruitment and Consulting Association) labour hire agencies, and 47% of non-RCSA agencies, have been requested by clients to complete a "hold harmless clause" (Brennan, Valos and Hindle, 2003:73).

These "hold harmless" clauses appear to be untested in the courts, but are of doubtful validity, given that section 28 of the *Workplace Health and Safety Act 1995 (Qld)* places responsibility on the labour hire employer and client, and given the legislative intent that duties under OHS legislation cannot be delegated (*Kondis v. State Transport Authority* (1984) 154 CLR 672). The clauses could be in breach of the workplace health and safety legislation, if they constitute a clear attempt to evade or undermine the legislation. Section 28(1) of the *Workplace Health and Safety Act 1995 (Qld)* provides:

> A person (the relevant person) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

It would seem too that the use of hold harmless clauses could act as a financial detriment to agencies, in that it has been estimated that, in New South Wales, the insurance cost of providing such indemnities could have added between 15 to 30 per cent to the premiums labour hire firms paid to WorkCover (*Sydney Morning Herald* newspaper, 19 January 2000, p.8).

The Committee in the Inquiry into Labour Hire Employment in Victoria Report 2005 (and the Victorian government in its response of January 2006) agreed that "hold harmless" clauses as agreements that transfer the risk of financial implications for

breaches of duties (whether legally enforceable or not) are contrary to the intent of OHS regulation.

Further, as was suggested to the New South Wales Labour Hire Task Force Inquiry (2001 at p.58) a practical problem under labour hire could be that a host or client company "has little direct financial incentive to manage OHS risk" because the labour hire agency carries the workers' compensation liability in respect of the workers. It has been noted that host organisations could shift the risk of unsafe work practices to labour hire agencies, through utilising labour hire for the most dangerous workplace tasks (Inquiry into Labour Hire Employment in Victoria (2005:104)). However where agencies have to pay increased workers' compensation premiums because of a higher injury rate, this ultimately will result in higher labour hire fees.

It has been observed in Victoria that the labour hire industry, compared to other employment areas, has a noticeably higher rate of workers' compensation claims (supra Inquiry, p.60). It could be the situation too that a labour hire company may not wish to press a client to spend on OHS prevention, for fear of losing business. The Victorian inquiry however noted that this did not change the fact that a client company bears substantial OHS responsibilities under the legislation. Further, where a labour hire employee is injured, the workers' compensation insurer may seek to claim from the liability insurer for the client, on the basis that the employee was under the supervision of the client at its premises.

It was submitted to the New South Wales Labour Hire Task Force by three interested business organisations, that the host company and the labour hire company can have different views as to the extent of responsibility of each of them for OHS training. Further labour hire companies indicated that not all host companies fully appreciated their responsibilities. One agency stated that some host companies expected the labour hire company to have all OHS responsibility, notwithstanding that the host company had control of the actual workplace.

A view was expressed to the Inquiry into Labour Hire Employment in Victoria 2005 (2005: 85), that for a labour hire agency the practical application of its general duties is problematic, in that an agency often has an incomplete knowledge of and no control over a client's premises and work practices and faces difficulties in inspecting all workplaces where there are short-term labour hire assignments.

The result of the foregoing in practice could be that insufficient measures are taken to protect labour hire workers, because both parties believe that the other is looking after training on a particular matter, or because the labour hire workers are not covered by OHS programs conducted by the labour hire agency and client. The consequence is that labour hire workers could be exposed to risk, especially for short term placements in high risk areas, and on worksites where there is constant change. This view is supported by comments from industrial agencies interviewed in this work, and reinforced by findings in a Victorian study that revealed that only 50 per cent of labour

hire employers surveyed supplied any training to their employees (Brennan, Vales and Hindle, 2003: 79, 80).

Regardless of the attitude of the parties, the legal policy is well established that both parties cannot avoid responsibility for workplace safety. New South Wales cases have established the position that a labour hire agency and a client can both be prosecuted for workplace safety breaches. In particular, it is clear from decided cases (such as *Drake Personnel Limited v. WorkCover Authority of New South Wales* (Inspector Ch'ng) (1999) 90 IR 432 at 455, 456) that an agency, that sends its employees into another workplace over which it exercises limited control, is for that reason under a particular positive obligation to ensure that those premises do not present a threat to the health, safety or welfare of those employees. Its obligations in that regard are increased, not diminished.

In the case of *WorkCover Authority (NSW)(Inspector Ankucic) v. Drake Personnel Limited t/as Drake Industrial Limited (NSW)* (1997) 89 IR 374 the Drake agency pleaded guilty to failing to ensure the health, safety and welfare of its employees at work and was fined $25,000. Hungerford J held that Drake as employer could not rely on the client to ensure safety at the workplace. In the case a worker was injured while cleaning a circular saw. He had been hired out by Drake to a company Warman International Ltd. The worker was inexperienced in the operation of the saw and had received no formal training on it from either organisation (his previous experience with the agency being in packing and forklift duties). The agency's failure in the case was that it had not ensured that it and the client organisation had properly trained the worker

in machinery operation and workplace procedures, and had not inquired as to the precise duties of the worker. Similarly the company Warman was fined for not providing proper training to ensure safe operation of the saw.

In the case of *Drake Personnel Limited v. WorkCover Authority of New South Wales (Inspector Ch'Ng)* (1999) 90 IR 432, where a process worker sustained a crush injury while operating an unguarded machine, it was held by the Full Bench of the New South Wales Industrial Relations Commission, that a labour hire agency cannot escape liability, merely because a client is also under a duty to ensure that persons working at its workplace are not exposed to risks. The process worker had been hired out to work at factory premises in the assembly of electrical components. Although a labour hire agency representative had inspected the machine which the worker was to operate, the worker was directed subsequently by the client business to work on another machine, the one where the worker was injured.

It was further held in the case that Drake Personnel had breached section 15 of the *Occupational Health & Safety Act 1983* (NSW), by failing to put in place a system which required the worker or client to report to it any significant changes to work conditions, such as in the case the employee being instructed to work on a different machine. A preliminary induction and safety inspection of a work site is only a partial discharge of an agency's OHS responsibility, and an agency has an ongoing responsibility to ensure the safety of a workplace for a labour hire worker. The case

indicates that there is an onus on an agency to ensure that a client gives notice of any work changes for a hired employee.

The case of *Inspector Gillarte v. Integrated Group Ltd* (formerly known as Integrated Workforce Pty Ltd) (2003) NSW IRComm 98 demonstrates the difficulty a labour hire company confronts in discharging its OHS obligations, when it does not control the workplace and does not supervise its workers there, and may be responsible for many workers on different work sites. In that case where a large structural beam had been transported across a galvanising plant, it was held that the defendant agency had failed to provide instruction and training to ensure that workers did not perform work at risk to their safety, contrary to section 16(1) of the *Occupational Health and Safety Act 1983* (NSW). It was found that the defendant, while it had conducted a risk assessment, had relied upon the host company to ensure that established systems were followed. It had not ensured that the host company had undertaken a risk assessment regarding the movement of steel structures by crane. It had also not enquired about the host company's OHS record, which would have shown there had been four previous convictions against the company.

The Commission made the following observations on the extent of the agency's duty:
"There is a positive obligation on labour hire companies to take such steps as are necessary to ensure that the work environment in which their employees are required to carry out work is safe and that those employees are not required to carry out work in circumstances which are unsafe or otherwise pose a risk to their health, safety or welfare. The difficulty this creates for labour hire companies is that they are, in a

pragmatic sense, compelled to exercise the same degree of foresight and vigilance as does their third party client, as if the third party client were the direct employer of the labour hire company's employees. This vigilance and foresight must be exercised in circumstances where the labour hire company will rarely have a responsible representative engaged full time at the third party client premises or otherwise involved full time in the operations of the third party client."

The Commission in the *Inspector Gillarte v. Integrated Group* case again emphasised the positive obligation on a labour hire company to take the necessary steps to ensure a safe work environment for its employees. A recent Queensland case on this point is *Newman v. David Knox Holdings Pty Ltd (2002)* 170 QGIG 189. That case concerned a forklift driver who was fatally injured while driving without a seatbelt. Though the client was regarded as having primary liability because it had an unsafe work site and unsafe work practices, the court held that the labour hire employer should have made reasonable enquiries and inspections of workplace practices (which included the culture at the client's worksite that seatbelts were not worn).

An even more recent decision about the positive OHS obligations of a labour hire agency towards its employees is the Victorian Court of Appeal decision in *Victorian WorkCover Authority v. Carrier Air Conditioning Pty Ltd* [2006] VSCA 63, which concerned a claim for indemnity on account of negligence by a third party. There Ashley JA (with whom Chernov JA and Mondie AJA agreed) held at paras 64 and 65 that the labour hire agency at the very least should reasonably have insisted that the

Carrier company give adequate instructions to the employee subsequently injured about the duties to be performed, and the equipment to be used for same; and should have insisted the employee be fully instructed on details of Carrier's OHS regime before he began work.

Overall Ashley JA held the agency to be considerably culpable, in that the circumstances indicated that it had sent its employee to work at (the host) Carrier, without showing any interest or concern for his safety. There was no evidence that the agency had made a site assessment as to the adequacy of Carrier's induction process and safety regime. There was also no evidence that it had inquired about what work was to be done, where, or with what equipment.

Ashley J however found the host Carrier should bear the main responsibility for the employee's injury. Carrier owed a duty of care to the worker which was akin to that owed by an employer to a worker. Though the task was simple, in the absence of adequate instruction, warning or equipment, there was a real risk that the worker would improvise to check on the loading of a skip, and lay himself open to injury. Accordingly Ashley J determined that the host's percentage of responsibility for the injury was 65%, and that of the agency was 35%.

As is shown by the *Newman* and Carrier cases, both agency and client can share liability in negligence. In *TNT Australia Pty Ltd v. Christie* [2003] NSWCA 47 the plaintiff had been assigned by a labour hire company, Manpower, to work for TNT. While operating a pallet jack, he suffered injuries to his foot when the machine malfunctioned. The New

South Wales Court of Appeal found TNT as the host company to be 75 per cent liable, and the agency Manpower to be 25 per cent liable. Mason P endorsed the trial judge's view that TNT's duty of care to the worker in relation to a safe system of work was similar to that of an employer.

On the issue of shared OHS responsibility, it has been noted in the New South Wales Labour Hire Task Force Report (page 64) that some client companies still expected, contrary to legislative provision, that a labour hire company should take full responsibility for OHS matters, even though a client company has control of the workplace. As a matter of policy this would seem unfair, given the lack of a labour hire company's direct control of a workplace. On the other hand, placing sole OHS responsibility on a client company, (as some agencies have argued in the New South Wales Report and in the empirical findings of this study), would be contrary to the purpose of a labour hire arrangement, in that this sole responsibility would cut out to some degree the benefit of using a labour hire by a host body.

It could be argued that the OHS legislation attempts to strike a proper balance in placing obligations on a labour hire agency and its client, rather than placing obligations solely on a labour hire agency or the client. As referred to in the interview findings of this study, one peak employer body considered that the labour hire workplace could be safer than a normal workplace by virtue of having more interested parties concerned with workplace safety. It referred to this as "proportional responsibility" present in terms of OHS.

In this view, if a labour hire company comes in to assist and facilitate the ongoing review and assessment of a workplace, then there are now two parties involved in monitoring workplace safety, that is, a labour hire company working in conjunction with a client company. In this way workplace risks and hazards can be better identified and controlled. At the 2002 National Industrial Relations Society Conference at Adelaide, some of the large labour hire firms in Australia advanced the argument that this concept of "proportional responsibility" between agency and client meant that supervision is best carried out on the actual worksite by the client company.

In light of the foregoing it appears that there is ongoing potential for dispute between an agency and client as to the division of responsibility and risk for workplace safety. It would seem from the general demarcation of responsibility, that ongoing differences of opinion between the parties can occur as the extent of responsibility of each party for general safety induction, training and specific issues of safety. As will be later referred to, one large union in the fieldwork interviews noted that a general problem with OHS legal obligations under legislation is that they are very general, rely on a joint liability approach, and rely to a large degree on self-regulation (for example through workplace committees). It was thought by the union that these factors were not conducive to labour hire. Johnstone (1999:73) argues that OHS legislation should recognise new work forms such a labour hire, explicitly outline the general health and safety obligations of those in control of the work processes, and provide for the coordination of efforts of the parties.

On the issue of clarification of OHS responsibility too, it is of interest to note that, notwithstanding the case law already on the subject, the New South Wales Labour Hire Task Force believed (at pp.10, 70) that there was sufficient doubt about the responsibility of labour hire companies and host organisations for OHS obligations, to warrant the need for case law to be reflected in legislative amendment to mandate the notion of joint responsibility for occupational health and safety.

In a recent decision too (28 February 2006) the Full Bench of the Industrial Relations Commission of New South Wales in the *Secure Employment Test Case* [2006] NSWIRComm 38 agreed with evidence of Unions NSW, that confusion existed between "host" and labour hire employers in relation to their respective OHS obligations, and that further clarification was needed. Evidence was submitted to the commission that labour hire employees normally were supplied to fill short-term gaps. Because of this environment host employers (client companies) were unable or unwilling to provide appropriate induction training and supervision.

The Full Bench agreed to an application by Unions NSW to a variation of exemplar awards, requiring host employers engaging labour hire employees to consult with those employees on OHS issues, and to provide to them appropriate OHS induction training and protective equipment. The result of this decision was that a host or client company had to satisfy the safety requirements of OHS legislation, and of the new award provisions.

3.4 Unfair Dismissal Legislation and Labour Hire

Fear of the unfair dismissal legislation was one reason identified in the interview findings, why organisations were attracted to labour hire. There are problems applying unfair dismissal principles to a labour hire situation, particularly with respect to applying the notion of an employer's control over an employee. As noted in the interview findings and in the Stevens Report 2002 (SA) (2002:59), one apparent advantage of labour hire to organisations as non-employers was the perceived ability of clients/host employers to "hire and fire" without risk of unfair dismissal claims, because there is no employment relationship between them and a labour hire worker. This finding has been supported by research that concerns over unfair dismissal regulation are a strong disincentive to the willingness of business to employ more staff (Harding, 2002). A client's power to end a worker's services with immunity has parallels to an employer's right under the employment at will doctrine in the U.S, whereby an employer could dismiss an employee for any reason or no reason at all.

The services of a labour hire employee can be terminated through the actions of a client company, merely on the basis that "it was unfortunate that your name was the one that came up": *Fary v. Clements Techforce Pty* Ltd (2000) SAIRC 56. Labour hire in that sense transfers the responsibility for unfair dismissal from the host business to the labour hire agency even though in practical terms it is really the client that is dismissing the employee of the agency, notwithstanding that it has no legal relationship with that employee. The agency thus as the legal employer will dismiss its employee essentially at the instigation of the client.

In addition, the triangular nature of labour hire makes it difficult for a worker to lodge an unfair dismissal claim against a labour hire agency, in the event of a termination of employment. Where a worker does not obtain further work at a host business or through a labour hire agency, it may be difficult to substantiate that a termination of employment has occurred for the purposes of the unfair dismissal legislation, where there is no further work available to occupy the worker. A labour hire worker may have also a practical problem in suing for unfair dismissal, in that he or she is not in continuous employment long enough to qualify to sue.

In summary, the termination position under labour hire is as follows. The traditional theory is that the legal employer has the control over the firing of an employee. The labour hire agency can be subject to the risk of unfair dismissal proceedings, even though in practice it is the host or client company that is the effective terminator of the worker's services. The custom under labour hire is that, if it is not happy with a worker, the host or client company is not to act directly against the employee. The host is to contact the provider agency and to request the agency to remove the worker. At present under labour hire there is an inability to join a host employer in an unfair dismissal action, even though the host employer's actions may have led to the labour hire employee being dismissed.

In effect, the host/client can hire and remove a labour hire worker without the risk of unfair dismissal claims, because there is no employment relationship between the host and worker, notwithstanding that the labour hire employee is dismissed effectively

through the actions of the host employer. As Stewart points out (2002:18), as part of the arrangement under labour hire there is agreement between an agency and client, that a client may dispense with a worker's services at its discretion or in stipulated circumstances. The client is the effective terminator of a worker's services, however any formal action is taken by the agency following a client's request.

While businesses may use labour hire as a form of risk management by minimising being exposed to the risk of an unfair dismissal claim, there can still be difficulties under the legislation for both the agency and client, where the client acts peremptorily without the agency's knowledge or where the agency does not insist on its contractual rights that the client give proper notice of a termination. *Misheva v. Spicers Paper Ltd & Adia Personnel Pty Ltd* (1998) 44 AILR 3-904 is an example of judicial confusion caused by the problematic nature of labour hire. In that case there were unfair dismissal proceedings before the now defunct Industrial Relations Court of Australia. The case concerned a worker who had been sent by the Adia labour hire agency to work for a business, Spicers Paper. After two months there her services were terminated. At an early stage of the proceedings the judicial registrar took the view that both agency and client were the employers of the worker. This problem was resolved later when the agency conceded that it was the employer. The court held that the agency Adia had breached the unfair dismissal provisions of the *Workplace Relations Act 1996 (Cth),* ss.170 DB - 170DF, when the business Spicers had terminated the employment of the applicant, and was ordered to pay $8,000 to the applicant.

The *Misheva* case is of some importance in that it showed that a labour hire agency could be sued for unfair dismissal (the power of dismissal being one of the powers of an employer), even when effectively it was the client that had ended the working relationship with the worker. In the case it was decided that the agency was liable for unfair dismissal, on the basis that the agency had not insisted on its contractual right that the client give eight hours notice of the worker's termination to the agency. Insistence on this condition would have given the worker a chance to respond to any allegations against her. The *Misheva* decision is consistent with the orthodox legal theory that recognises the labour hire agency being the employer as the entity responsible for an unfair dismissal where it can occur in labour hire, notwithstanding the fact that in many cases it is the client company that effectively brings about the dismissal.

Problems can also arise with respect to unfair dismissal claims, where the labour hire firm, as well as the client, seeks to deny that the agreed worker is its employee. The case of *Potts v. Tolsat Pty Ltd* PR 924332 (6 November 2002) illustrates the point. This case involved an application for relief in respect of the termination of employment under the Federal *Workplace Relations Act 1996 (Cth).*

The Commonwealth legislation like the Queensland legislation set out specific factors that the Commission was required to have regard to when determining whether a dismissal was harsh, unjust or unreasonable. These included:

(a) whether there was a valid reason for the termination;

(b) whether the employee was notified of that reason;

(c) whether the employee was given an opportunity to respond;

(d) whether the employee was warned about the unsatisfactory performance before termination; and

(e) any other matters that the Commission considered relevant.

Potts was a trainee at an abattoir, and asserted that he had been an employee of Tolsat, the abattoir operator. Tolsat in return claimed that it was not the employer, but that the Food Safety Operations Group Employment & Training Ltd. ("FSOGET"), which provided labour hire employees and trainees, was Pott's employer. It was alleged however on behalf of Potts, that the abattoir operator employed the man, and only later re-arranged his employment as a trainee through FSOGET.

In determining the identity of the true employer, the Commissioner in the case had regard to the following factors:

- FSOGET was part of a group of companies responsible for the employment, training and "arms length" supervision of employees placed at client's sites.
- This group of companies invoiced Tolsat weekly on the basis of the employees' daily time sheets.
- The employee, Potts, had completed an ATO (Australian Tax Office) employment declaration that identified FSOGET as employer.
- FSOGET provided training, group and employment separation certificates.
- The employee, Potts, was under the direct supervision of Tolsat on the site, for day-to-day operations and also for occupational and safety reasons.

The Commissioner found in the case that there was a genuine commercial arrangement between FSOGET and Tolsat, and that the agency, FSOGET, provided the labour on the basis that the employee would not become the employee of Tolsat. Accordingly, the agency and not Tolsat was the man's employer. The arrangement did not constitute a sham but was a labour hire arrangement. As a result the Commission's jurisdiction could not be invoked to deal with the application.

A contrasting case is the case of *Nguyen v. A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel and Thiess Services Pty Ltd* (2003) 128 IR 241. There the client company, Thiess was held to be the true employer, and the engagement by the labour hire entity was seen to be a charade. In that case however, the New South Wales Commission regarded the arrangement as "atypical" and different from a normal labour hire arrangement, in that the employee, Nguyen, was initially engaged directly by Thiess, and it was only after a number of days that her employing entity became the labour hire company. The New South Wales Commission found that Thiess as the host company, not the labour hire company, was the "actual or real and effective" employer, because it had "day-to-day control over the (labour hire worker's) recruitment and employment in every real and practical sense and, similarly, over the termination of her employment".

The New South Wales Commission thus held Thiess responsible for the unfair dismissal of the labour hire worker in violation of the proscription on dismissing on an employee on the grounds of pregnancy. The labour hire agency ANT Contract Packers was considered as a mere "conduit" or payroll service provider to pay the employee's wages

and on-costs such as workers' compensation. The case is an illustration of the point that, merely because an apparent labour hire arrangement is put in place, it does not always follow that a client company is immune from an unfair dismissal claim.

As pointed out by Orr (1998:159-185) and Noakes (1999:1-34), the case of *Patrick Stevedores Operations No.2 Pty Ltd v. MUA* (1998) 195 CLR 1 illustrates that corporations law and the concept of labour hire can be used for doubtful purposes with respect to the termination of employees' services. This case concerned the well publicised 1998 waterfront dispute between Patrick Stevedores and the Maritime Union of Australia (MUA). In the case waterside labour was transferred to subsidiary companies of Patrick that had been set up as labour hire companies, pursuant to a restructuring by Patrick. In this way the head Patrick company rid itself of its unionised workforce, with a view to engaging a replacement non-union labour force. It then stripped the labour hire subsidiary companies of their assets, forcing them into liquidation.

The result was that those companies as the legal employers of the labour force had no money to pay to the waterside employees their entitlements on termination. These manoeuvrings were in the end blocked by the grant of an injunction, on the basis that Patrick was violating the freedom of association provisions contained in section 298K of the *Workplace Relations Act (1996) (Cth).* The High Court upheld this decision by North J. of the Federal Court to impose an injunction, which prevented Patrick Stevedores terminating the labour hire agreements.

Noakes (1999:33,34) points out however that the restructuring undertaken by Patrick was not per se an infringement of any sections of corporations law, and that the Patrick case illustrates that the separate entity principle in company law can be availed of to avoid liability for termination of services in an employment situation, in this case one of labour hire.

A recent Queensland case demonstrates however that the potential exists for a labour hire company to be found liable under unfair dismissal legislation, where it automatically relies on a host company's direction. The decision of the Queensland Industrial Relations Commission indicates that a labour hire company should make a full and proper enquiry prior to any dismissal action which may impact on one of its employees. In the case of *AMEPKI (for Vincent Fenech) v. CHR Group Pty Ltd* [2005] QIRComm 6, the Queensland Commission confirmed that an employer cannot avoid its rights and obligations arising under contract with an employee, through its contract with a third party outside the employment relationship. In circumstances where an employer in effect gives control over its employees to a third party, it still may be held responsible for any unfair or unlawful conduct of the third party in respect of its employees.

The circumstances of the case were that Mr Fenech was employed by the CHR Group and placed at a worksite pursuant to a contract between the CHR Group and the client company for the supply of labour. The contract provided that the client could advise the CHR Group, that a particular employee was not required and could request a

replacement. After being nine months at the work site, Mr Fenech was elected the union delegate for the CHR Group's employees at the work site. A short time later the CHR Group issued a warning about poor productivity to Mr Fenech, essentially following directions from the client company.

The union on behalf of the employee responded to the CHR Group that the client's complaint was driven by Mr Fenech's role as a union delegate and that there was no basis to productivity claims. Though the CHR Group relayed these claims to the client company, it accepted without question the company's denial about the matter. Later on following more allegations about Mr Fenech's poor productivity, the CHR Group removed Mr Fenech from the work site without further enquiry. The Commission found that the CHR Group's actions were for reasons including a prohibited reason, that is the employee's role as a union delegate. The CHR Group as the employer labour hire company was found to have breached the freedom of association provisions of the *Industrial Relations Act 1999 (Qld)*, notwithstanding that the dismissal had occurred as a result of the actions of the host company. The labour hire company was ordered to pay $7,500 in damages to Mr Fenech.

It can be seen from the preceding authorities that the use of labour hire is an avenue that can be used by business to escape from regulation of the standard employment relationship, that is contained in the proscriptions of unfair dismissal legislation. However it has been shown that legal difficulties exist for labour hire agencies, where client businesses use labour hire, and do not act appropriately in terminating the services of labour hire workers.

It has been pointed out too that labour hire workers can have threshold difficulties in pursuing claims under the legislation, because of problems with continuity of service, as labour hire workers are invariably classed as casual workers, and as such not eligible to make a claim under Queensland or Federal legislation, unless engaged on a regular and systematic basis for at least twelve months. A distinction is made between long-term and short-term casuals for unfair dismissal purposes. Thus under section 638 of the *Workplace Relations Act 1996 (Cth)*, short-term casuals (those engaged for less than 12 months) are excluded from lodging unfair dismissal claims. As to the distinction between casual workers it has been held in *Franks v. Reuters Ltd and First Resort Employment Ltd* [2003] EWCA Civ 417 that a long term labour hire worker (five years) could be an employee of the host company, not the labour hire agency, pursuant to an "implied" contract.

3.5 The "Joint Employer" Concept

A new development which has significant implications for labour hire arrangements is the concept of "joint employment". In essence this means that an employee may be employed by more than one employer at the same time. Under this concept a client or host company may be made liable for unfair dismissal and other purposes, and a party to a labour hire dispute, even though it has no employment relationship with the labour hire worker. The theory is based on the view that the client company has powers integral to the dispute and can directly affect the employer/employee relationship. This theory of dual employers is of course contrary to and an erosion of the common law doctrine that there is only one employer in an employment relationship.

As pointed out by Tansky and Veglahn (1995: 293), a labour hire arrangement is made more complex than a traditional employment arrangement in that there is more than one organisation carrying out employer-like activities. In this regard it appears plausible to argue that assumptions about labour hire responsibilities should move, if control over dismissal and worker's performance moves. However the doctrine of "joint employment" while recognised in the USA, and while noted in Australian cases, has yet to be adopted here, partly it would seem because it flies in the face of the common law approach. There is no jurisdiction in Australia that has legislative provisions to deal with joint employment.

A key notion of the joint employment concept is that an employee should be permitted to take action against either the labour hire firm or host company or both. Thus it would permit an employee to sue a client company for unfair dismissal. As noted there presently is an inability to join a host business in an action for unfair dismissal, where the host business's actions have led to the labour hire employee being dismissed. As such, it seriously challenges the present common law principles under the contract of employment. It would also reduce the value of using labour hire workers for organisations.

The concept of joint employment was referred to in the Stevens Report (SA) (2002:60-62), and also in the Commonwealth House of Representatives Inquiry into independent contracting and labour hire arrangements (August 2005). The latter inquiry (at pages 63-65) notes that the concept of joint employment arose "in the United States in the 1930s as a statutory response to labour hire arrangements aimed being used to avoid

collective bargaining laws and employee entitlements protections". The Commonwealth Inquiry notes (at page 64) that under the doctrine of joint employment recovery action for employee benefits or entitlements can be taken against a labour hire company or its client, on the basis that both are regarded as employers.

Cullen (2003: 1-2) points out that in the USA there is both common law and statutory recognition that separate entities may be joint employers of a single employee, and that under the US common law and the *National Labour Relations Act* (the NLRA) a joint employer relationship is found where parties "share or co-determine those matters governing essential terms and conditions of employment" (*Texas World Service Co.Inc. v NLRB* 928 F 2d 1426 at 1432) (5th Cir 1991)).

Under US law the fundamental criterion in determining whether an entity is a joint employer is the degree of control exercised by that party over the worker in question. Factors used in determining the degree of control include the power to hire and have a worker removed or fired; whether the employment takes place on the client's premises; the right to supervise work; the control of the work schedule; and the ability to discipline workers (Cullen 2003: 2).

While the concept of joint employment is well established in the United States, the doctrine has not been the subject of rulings by any Australian court or commission. The doctrine however has been the subject of comment in some Australian cases. In *Morgan v. Kittochside Nominees Pty Ltd* (2002) 117 IR 152 the Full Bench of the

Australian Industrial Relations Commission (AIRC) stated that they were inclined to the view that no substantial barrier existed, if the right factual situation arose, in finding that a joint employment relationship could be given effect to for certain purposes under the *Workplace Relations Act 1996 (Cth)*. The Full Bench referred to the USA concept of joint employment, and observed that the concept had been used in the USA to respond to "the use of labour hire arrangements by employers in circumstances that conduced to an avoidance of labour regulation and employee protections". With respect to the latter comment the Stevens Report (SA) (2002:61) indicated that the concept could be used by a commission to deal with situations where there had been an unfair dismissal of a labour hire employee because of the intervention of a host employer, or where the employee had not received wages because the host employer had not paid the labour hire company.

The concept of joint employment was also regarded with favour by the New South Wales Industrial Relations Commission in *Nguyen v. A-N-T Contract Packers Pty Ltd* (2003) 128 IR 241, though it was noted that there was at that time no clear authority for reaching such a conclusion. The concept of joint employment was also raised in the New South Wales case *SDA v. Glaxo Smith Kline* (11 June 2002). There a worker was engaged at Glaxo Smith Kline (Glaxo) through the labour supplier, Forstaff. The worker was declined continued employment, after he was involved in a fight with another worker. The SDA (the Shop, Distributive and Allied Employees Association) on behalf of the worker notified the New South Wales Industrial Relations Commission of a dispute between the parties under section 130 of the *Industrial Relations Act 1996 (NSW)*.

An issue for determination then was whether the SDA had jurisdiction to intervene in a matter involving a person, who was the employee of another entity. Glaxo argued that, because of its labour supply relationship with Forstaff, there was no legal relationship between it and the labour hire worker. However Commissioner Tabbaa took the view that an industrial dispute existed which could be arbitrated, on the basis that the worker was in a position of being from an industrial relations perspective within an "of service" relationship with Glaxo, because of Glaxo's control over the worker.

The Commissioner was of the view that:

> there is a need for a re-examination of the principles of IR law, as they should be applied to host employers due to the control they exercise over workers they engage through a labour supply agency.

It should be pointed out too, that in the Stevens Report 2002 (SA) (pp.13-14) a specific recommendation was made that a labour hire employee be able to take action in the Industrial Court or Commission against a labour hire agency, host company or both for unfair dismissal (and underpayment).

Harley (2003: 84) and Jesser (2005: 81-83) point out that the application of a joint employment doctrine in Australia would have substantial ramifications for employment relationships and in particular the use of labour hire arrangements, in that a client company would be affected directly by claims such as in relation to termination of employment and for employer negligence.

3.6 Vicarious Liability

Vicarious liability is another instance of the legal anomalies arising under labour hire, because of its different nature to that of a standard employment relationship. Here, as elsewhere, a labour hire agency is regarded as the employer for legal purposes, notwithstanding its general lack of control over its labour hire employees.

Vicarious liability refers to the liability imposed on a person for loss or injury resulting from the wrong doing of another person, even though the person who is vicariously liable may not have been personally at fault. Vicarious liability in tort arises by virtue of the relationship between the wrongdoer and the person who is vicariously liable. An example of the common law principle of vicarious liability is the situation of an employer who is vicariously liable for the torts of an employee, committed during the course of that employee's employment: *Darling Island Stevedoring Lighterage Co.Ltd. v. Long (1957)* 97 CLR 36 per Kitto J. at 63.

As stated by the Queensland Law Reform Commission in its report on Vicarious Liability (Report No.56, 2001:9), vicarious liability is used as a matter of policy to extend liability arising from the commission of a tort. In this regard it noted the statement of Scarman LJ in *Rose v. Plenty (1976)* 1WLR 141 at 147 that "... the principle of vicarious liability is one of public policy. It is not a principle which derives from a critical or refined consideration of other concepts in the common law".

The Queensland Law Reform Commission drew attention to the fact (at p.18) that the most common example of vicarious liability is where an employer is liable for the torts

(wrongful actions) of an employee committed in the course and scope of his or her employment. The employer is regarded as liable because of what the employee has done or failed to do, as contrasted with liability where the employer is personally at fault, such as where an employer unreasonably fails to control an employee's conduct, where it is reasonably foreseeable that the employee may cause harm to a third party. The two essential elements for vicarious liability are that an employment relationship exists, and that a tort is committed in the course and scope of an employee's employment. Generally speaking a principal is not vicariously liable for the negligence of an independent contractor or the contractor's employees with respect to work done at the request of the party. It may be liable where the safety of employees is involved (*Kondis v. State Transport Authority* (1984) 154 CLR 672).

Vicarious liability is a further example of a regulatory burden imposed upon an employer under the standard common law employment relationship. As is the case with other legal responsibilities of the standard employer, labour hire here provides an escape from this burden for business organisations. In labour hire the host company/client gets the benefit of the work from a labour hire worker. However, it does not carry any employer-like risk associated with the work of a labour hire worker, such as the employer's liability to provide a safe system of work for an employee. In particular a client company does not carry the vicarious liability of an employer for the wrongful acts of the employee causing harm to others. The client organisation is able to absolve itself of responsibility by excluding itself from such risks that are carried by the standard employer.

However such a legal arrangement under labour hire poses special problems for a labour hire agency as employer. A labour hire agency as employer is vicariously liable for the actions of a labour hire worker, if they cause injury or damage to another person. This situation raises obvious practical difficulties for a labour hire agency, in that it may not always be aware of what its employee is doing at any particular point in time, given the impracticality of overseeing the day to day activities of that worker. As will be disclosed in the interviews with agencies, agencies will try to get around this difficulty by requiring notice pursuant to the agreement with the client, of any changes in work or work procedures.

It is noted that under the *Anti-Discrimination Act 1991 (Qld.)* a labour hire agency as an employer can be vicariously liable for sexual harassment by one of its employees. Section 133(1) of the Act provides that, where an employee contravenes the Act, the employee and employer are jointly and severally liable for the contravention, and action may be taken against either or both.

Perhaps with respect to the labour hire arrangement an alternative view could be argued that vicarious liability should be devolved onto the client organisation (following a Scandinavian approach) in that the labour hire agency-client contract is a means by which the agency delegates its authority to control and direct the employee to the client. This approach of course would militate against the advantages of using labour hire for a client organisation.

The legal trend however is firmly in favour of regarding the employer as liable for the torts of its employee, where it "lends" the services of an employee to another party. At common law where an employer lends an employee to a third party and that employee commits a tort while carrying out work for a third party, the employer remains vicariously liable for the tort of the employee, unless it can be shown that the employee has become an employee "for the time being" of the third party. The onus of proving a transfer of employment rests with the initial employer, and is a "heavy onus which can only be discharged in quite exceptional circumstances": *Deutz Australia Pty Ltd v. Skilled Engineering Ltd* (2001) 162 FLR 173 per Ashley J. at 189.

An earlier authority for the proposition is the English case of *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* [1947] AC 1. There the Harbour Board Authority had hired out a mobile crane and driver to a stevedoring company. Although the power of dismissal over the driver remained with the Board, under the general hiring conditions the driver was to be the employee of the hirer.

While operating the crane the driver negligently injured an employee belonging to the stevedoring company. The Harbour Board argued to no avail that it was not vicariously liable for the driver's negligence, on the basis that it was not the employer of the driver at the time of the accident. Notwithstanding the terms of the agreement between the Board and the hirer company, the House of Lords held that the Board had not succeeded in satisfying the burden of proving that a transfer of employment had taken place.

In a later English case of *Denham v. Midland Employers Mutual Assurance Ltd* 1955 2 QB 437, Lord Denning appeared to confuse the issue of vicarious liability with respect to labour hire when he stated that a transfer of employment "only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only what the servant is to do, but also how he is to do it". This statement seems to suggest that vicarious liability would be placed on a client organisation under labour hire.

However Denning's view was opposed by Ashley J. in the Victorian Supreme Court case of *Deutz Australia Pty Ltd v. Skilled Engineering Ltd* (2001) 162 FLR 173. In commenting on circumstances which are sufficient to shift the responsibility of vicarious liability from a general to a temporary employer, Ashley J. declared (at pp.189-190) that a transfer of vicarious liability occurred apart from other situations "where it cannot be said that the reason that the worker subjected himself to control of the so-called temporary employer as to what he did and how he did it was that his general employer told him to do so". By doing so Ashley J. denied the transfer of vicarious liability in a labour hire situation.

This view of Ashley J. was backed by the Queensland Law Reform Commission in its report (at page 55), where it expressed the opinion that while a contract of employment remained in place between a general employer and an employee the general employer should remain vicariously liable for the torts of a lent employee, committed in the course of his or her engagement with a third party. Under the Queensland law as it now

stands an employer (such as a labour hire agency) who "lends out" an employee is to all intents and purposes vicariously liable for any civil wrong by that employee.

The result is that, in contrast to the standard employment relationship, under labour hire a client organisation can get the benefit of work from a labour hire worker, but does not carry the risk of vicarious liability normally associated with an employment relationship.

3.7 Anti-Discrimination Legislation and Labour Hire

There would appear to be evidence from the empirical data of this project, that there is a potential for labour hire to be used to evade the prescriptions against discrimination by employers in the selection of employees, contained in legislation such as the *Anti-Discrimination Act 1991 (Qld).*

Confirmation for this view comes from the Inquiry into Labour Hire Employment in Victoria Report (2005:36), where it was found from evidence received that ambiguities raised by labour hire arrangements in the application of Victoria's anti-discrimination legislation, the *Equal Opportunity Act 1995*, were an example of the triangular relationship of labour hire providing avenues for unscrupulous agencies and client organisations to take advantage of. It was an illustration to the investigating committee of "labour hire's uneasy fit with laws based on bipartite employment relationships".

A feature of the labour hire arrangement, as opposed to the common law arrangement, that emerged from some of the agency field interviews was that client companies actually were using labour hire to evade the anti-discrimination legislation because it gave them a way of actually discriminating, that they could not do as a normal employer. From the information supplied labour hire appears to permit a form of discrimination by client companies in the selection of candidates, in a way that the legal employers cannot act. Clients in practice select from a list of candidates prepared by the agency, who is the legal employer. It would seem that even if an agency has reservations about a client's intentions the agency protects itself by submitting the list, and leaving it up to the agency to make a choice of employees. The client in a sense can discriminate by virtue of being a non-employer, who is not subject to the regulatory burden on an employer not to discriminate towards potential employees.

While it will appear from the field work evidence that discrimination issue does not appear to be a major problem in labour hire, it is noted that one labour hire agency thought that the anti-discrimination laws were a significant factor in why companies use labour hire. The agency thought that the use of labour hire avoids any potential liability that may occur normally, where employers discriminate against potential candidates thought to be inappropriate for a workplace, even though they may have the best qualifications for the job. As a non-employer a company thus can take advantage of the medium of labour hire to avoid the requirements of anti-discrimination legislation.

In the agency's view discrimination could arise because a client company could pick and choose at its discretion, from a group of candidates recommended by an agency. In

addition agencies tended to be always mindful of the "fit factor" (that is, the person being compatible with the organisation). It would seem that borderline situations of unlawful discrimination could occur because of this, in that while an agency and client may generally be after the most efficient person for the role in question, both parties have to be mindful whether the person in question can fit in with the rest of the organisation, given the nature of the employees there. This view was shared by another labour hire agency: "Why would you put a worker in an environment that you know that they are not going to be happy in? Sometimes we will challenge the employer by putting in say a male receptionist. I mean males don't traditionally apply for those positions".

It would appear that, as in Australia, potential exists in the USA for labour hire to be used in the evasion of anti-discrimination legislation. This potential is referred to by Houseman (1998: 1138), who notes that it is often asserted that companies can avoid liability for discrimination by using agency temporaries and others instead of their own staff. However she observes that with respect to the engagement of agency workers a client, along with the staffing firm, may bear some liability for discriminatory behaviour under USA legislation such as the *Americans with Disabilities Act*, which prohibits discrimination in employment on account of disability. The latter Act specifically prohibits participation by a business in an arrangement that causes discrimination against a disabled applicant or worker. Thus both a client business and staffing firm can be liable under the legislation.

The preceding raises the legal issue of whether in Australia a host organisation in a labour hire arrangement should be classified as a quasi-employer for anti-discrimination purposes. An observation could be made in this respect that a client's involvement in the discriminatory selection of a candidate could be likened to a situation under the law of trusts, in that it could be argued that a client company is "intermeddling" in the contract of employment relationship between the labour hire agency and the labour hire employee, by improperly carrying out one of the roles of a legal employer, that is, the role of selecting employees. Just as a person becomes liable as "a trustee de son tort" by intermeddling in a trust by doing acts characteristic of trustee, so it could be submitted that a client company should incur liability for doing acts characteristic of an employer in a labour hire situation, such as the selection of employees and exercising direct control and supervision over the employees, even though it is not the legal employer.

3.8 Labour hire and coverage by industrial instruments

One issue at the heart of labour hire is how labour hire workers should be treated in terms of remuneration and work conditions, compared to the workers they work side by side with. Questions of fairness can arise if labour hire employees are doing the same work, but are getting paid less (say at an award rate), after taking into account casual loadings) than their permanent counterparts, and are denied other higher benefits of a collectively negotiated labour agreement of the host business. Such a practice creates two classes of workers in respect of the same work.

Evidence was supplied to the Commonwealth House of Representatives Inquiry (2005:169), that a major reason for the growth of labour hire was the ability that it provided to undercut industrial agreements, that is the awards or certified agreements applying to a host company. Labour hire agencies can provide inferior wages and conditions compared to the site rates, while essentially the same work is being carried out.

An industrial issue which arises from this then is whether labour hire workers should be paid "site" wages, and enjoy the same "site" entitlements as far as possible, as provided to permanent workers on the site. The practical problem with this, however, for the other parties to the labour hire arrangement is that, if agencies are forced into site awards or enterprise agreements, then a client could be charged more for the service, and in this way an agency could lose business. Because a labour hire agency is not the employer at the site or enterprise, it is unlikely to be legally subject to site awards and/or the conditions of collective agreements for that site. The Labour Council of New South Wales in this regard brought to the attention of the New South Wales Labour Hire Task Force, the situations where flight attendants employed by a well known labour hire agency work side by side with employees of the Qantas airline, but for lower rates.

A key issue then in light of the foregoing (as considered by the New South Wales Labour Hire Task Force 2001) is "the desirability of facilitating industrial instruments for the labour hire industry, or of applying the prevailing conditions of the host employer to labour hire workers". On this issue the Task Force itself (p.75) could not

reach any consensus, but at the same time expressed sympathy for the view of unions that payment of host company rates for labour hire workers "promotes fair and equitable outcomes, consistent with the objects of the *Industrial Relations Act 1996*".

As noted by Bernstein (2004:56), there have been attempts by Australian unions in the federal sphere to obtain awards binding client companies of labour hire agencies, so as to obtain greater security for labour hire employees. For this to occur, the Australian Industrial Relations Commission (AIRC) had to make a finding of an industrial dispute as to matters that pertained to the employment relationship, before it could attempt to resolve the matter by various means such as award regulation. The issue for decision was whether a client company (a non-employer) could be a party to such a dispute. On a few occasions the AIRC has held that this could be the case.[2]

In *CPSU (the Community and Public Sector Union) v. DFP Recruitment Services Pty Ltd and Another* (PR933447, unreported, 25 June 2003, Smith C) a dispute was held to have existed between the CPSU, Telstra and a labour hire company known as Dorothy Farmer. In the case the labour hire company employed call centre workers, who were hired out to Telstra at its Ballarat call centre. The workers were advised that, as a result of a decision by Telstra, their hours of work were to change from daytime to night and weekend times. Non-agreement to this change would lead to termination of employment. Commissioner Smith, in dismissing an application by Telstra to cancel a finding of dispute with it, stressed "the underlying influence of control exercised by the non-employer". He noted in particular that "the contract which the employee is

[2] However it should be noted that labour hire restrictions are now explicitly NOT allowable award matters. In particular see *Workplace Relations Act 1996 (Cth)* s.515(1)(h).

required to sign with Dorothy Farmer makes the control by Telstra, in relation to skills required, work practices and remuneration, clear".

It was claimed by the Queensland Government before the Commonwealth House of Representatives Inquiry (2005:138), that very few labour hire employees were covered by enterprise bargaining agreements, and that most were only covered by basic awards. Further one union at the inquiry argued that being in labour hire employment was not conducive to enterprise bargaining, as labour hire employees being invariably temporary employees were in a weak bargaining position.

One way of providing site coverage to labour hire workers, at least in Queensland, could be by way of a "common rule" award, which applies to anyone working in an industry, and is not restricted to locality or respondents. Such an award would apply throughout Queensland, and would provide for minimum conditions. A general example of this type of award would be the Clerical Award (Q). It would seem too in other States wages and conditions applying to all clerical employees have been set by State based common rule awards (Australian Services Union submission to the Inquiry into Labour Hire Employment in Victoria). A result of this type of award would be that clerical work performed through labour hire companies would have to be paid at the same rate as that of other clerical work generally. However it needs to be conceded that

since 1996 a corporate employer could avoid the application of such an award by entering into federal certified agreements or AWAs.[3]

Another way awards have been used to restrict the use of labour hire arrangements is by having provisions (such as in the Fresh Start Bakeries Australia Pty Limited (NSW) Enterprise Award, 2004) limiting the length of placement of labour hire workers. An award also may specifically provide that labour hire employees are to receive the same rate as permanent employees. For instance a Federal award involving the Commonwealth Bank of Australia (CBA), Adecco (a leading labour hire company) and the Finance Sector Union, prescribed the same pay rate for casual labour hire staff as for CBA employees, plus a 25% casual loading.

Unions also have tried to cater for labour hire workers by seeking provisions in certified agreements with host companies that ensure, in addition to consultation and agreement over the use of labour hire, that labour hire workers enjoy the same wages and conditions as the employees of the host companies. The Australian Services Union in its submission above indicated that this approach had been a practice of the union. However this would seem to be no guarantee of equal pay for equal work for labour hire workers. Hall (2002:7) refers to case studies presented to the New South Wales Labour Hire Task Force by the AMWU (Australian Manufacturing Workers Union) which revealed, apart from failures to pay according to the appropriate award classification and to casual loadings, failure to pay site rates to labour hire workers, where it was a condition of an enterprise bargaining agreement. In any event, it would seem that in

[3] In particular the manner that the "no-disadvantage test" applicable at the time was administered allowed erosion of some award conditions.

future specific clauses in collective agreements about labour hire would be ineffective, as the Commonwealth Work Choices legislation (which prima facie at present would override State legislation) forbids conditions regarding the use of labour hire in enterprise agreements, (such as those restricting the use of labour hire as for example in the Queensland Public Health Sector Certified Agreement (No.4) 2000[4]).

As noted there have been some specific collective agreements relating to labour hire in Australia. These have usually been struck in areas where unions have possessed a certain level of industrial strength, such as the construction industry in Victoria. The Labor Council of New South Wales in its submission to the New South Wales Labour Hire Task Force (p.28) referred to one union, the TWU (Transport Workers Union) having 15 registered agreements with labour hire firms (large and medium) operating in the transport industry, because of the increasing use of labour hire in the industry. One aim of the agreements is that labour hire workers are paid the greater of the site or award rate applicable to site workers. One specific agreement of note was registered in 1999 between Adecco (a very large international labour hire company) and the Australian Services Union, which provided for the conditions of supplementary clerical workers supplied by the company to its clients in New South Wales and the Australian Capital Territory. This covered a number of work issues, such as pay, OHS, dispute settling procedures and so on.

[4] Ironically the Queensland Public Health Sector CA may be one which is exempt from the impact of Work Choices, so long as it applies to Queensland government employees.

This chapter provides an analysis of legal issues or anomalies relating to labour hire which have arisen in Australian case law, or are affected by legislation. The analysis gives support to and is consistent with the theoretical contentions outlined at the beginning of the thesis, about the uneasy fit of common law employment principles to labour hire, and the relationship between increased regulation of standard employment and the rise of labour hire.

Australian cases are referred to show that there is scope for confusion about and blurring of the legal obligations of a labour hire agency and of a client, on issues such as the identity of the employer in labour hire situations, vicarious liability for the actions of workers, and liability under workplace health and safety, unfair dismissal and anti-discrimination legislation. As well the problematic nature of industrial coverage is highlighted. The disputations as to liability between agency and client in the cases referred to, and the apparent attempts to evade employer responsibilities, tend to add weight to the argument about the attraction of labour hire to organisations, in that labour hire allows the devolving of risks associated with direct employment.

In this chapter it is shown in particular that, because the special tripartite nature of labour hire involves the splitting of the standard employment responsibilities (such as for example the day to day control of a worker) between agency and client, the use of labour hire has been problematic from a legal (and practical) point of view as regards allocation of risk and responsibility. One result of this is that courts at various times have been confronted with difficulties, as to where liability should lie in different labour hire situations.

Tensions are thus shown to exist between the concept of labour hire and present legal principles, which were designed for application to the standard employment situation, based on the existence of only two parties.

In conclusion a review of the analytical insights of this chapter will be undertaken in the concluding chapter.

Chapter Four

Regulatory impact on the standard employment relationship

4.1 Introduction

The area of employment is but another example of how legal regulation of an area of human activity can have an impact that has unintended or collateral consequences, in this case, the development of labour hire.

This chapter critically reviews American and Canadian literature that deals with regulatory impact on the standard employment relationship, with its attendant consequences of added costs and obligations on employers. The conclusion drawn from the literature is that legal regulation of the standard employment contract has had the effect, from an employer point of view, of adding further costs and obligations on employers. As a consequence, employers in the USA have incentives to go to less regulated or unregulated labour markets such as labour hire, which offer the prospect of potentially cheaper labour costs overall and, more importantly, actual or perceived avoidance of the health and safety, workers' compensation and unfair dismissal obligations of an employer.

The chapter begins with an overview of theories of regulation, with particular reference to some general propositions on the effects of regulation. It then moves to particular theories from the United States (US) and Canada about why employers there are attracted to using secondary labour markets like labour hire. It ends with descriptions of empirical studies explaining why US employers use contingent work arrangements.

4.2 Spillover effects of regulation

Various theories have been advanced as to the rationale for the existence of regulation. For instance according to Rosner (1974: 335, 336) under the "public interest theory" regulation is a mechanism used in response to public demand to set right or counteract inefficient or unfair market practices. In this way regulation is justified which imposes minimum wage levels or occupational licensing. According to Jordan (1972: 154, 176) however the actual result of regulation of various areas has been to protect the producers rather than the consumers, on issues such as price levels.

By way of contrast the economic theory of regulation introduced by Stigler (1972:3-21) argues that economic regulation exists to serve interest groups in society, such as labour or business organisations. Any resultant regulation as a result of their pressures is intended to confer an economic gain of those groups. The value of the theory lies in identifying who gains and who loses from regulation. Where entry to an area of economic activity is unregulated, a result may be over competition and too many failures amongst competitors.

Rather than being concerned with theories of regulation per se, this thesis specifically focuses and builds on the issue of the "spillover" (or unintended) consequences of regulation. In particular a review of the relevant literature on these consequences now follows.

Makkai and Braithwaite (1993: 272, 285), in looking at the compliance costs of conforming to Australian nursing home regulation, reach a predictable conclusion that the anticipated costs of conforming to regulation is a likely indicator of the extent of future compliance to that law by management of nursing homes, that is, there is data that suggests that growing anticipated regulatory costs will cause a corresponding fall in regulatory compliance.

The authors analysed data, on the costs of nursing home compliance with regulation, to test the hypothesis earlier suggested by Viscusi and Zeckhauser (1979: 437-456), that the higher compliance costs are, the lower the level of compliance will be with regulatory standards. Data on over four hundred nursing homes in Australia constituted the basis for the analysis.

Makkai and Braithwaite also discovered (1993: 281) from analysis of data that there is a connection between compliance and a view that the regulated standards are proper in the sense of worth having, practical or fair, and the likelihood of punishment for non-compliance. Makkai and Braithewaite (1991: 191–200) have demonstrated elsewhere that a belief that regulatory standards are proper and reasonable is important in securing voluntary compliance. They note that longstanding business studies indicate that

voluntary compliance with regulation is hard to obtain, where industry does not consider the standards to be beneficial, achievable or fair. Makkai and Braithwaite, in reaching their conclusion that the estimated cost of compliance provides a meaningful gauge as to the likelihood of subsequent compliance, highlight their earlier reference (1993: 272) to the possibility that imposing a more stringent safety standard might have a reverse consequence.

Grabosky (1995: 351) makes the point that "A common outcome of regulatory policy is the tendency for non-compliance to be displaced into other areas within or beyond a regulatory jurisdiction or policy demand". To him this situation would yet be another example of a regulatory initiative having an unintended consequence or creating collateral damage. He, for example, notes that industries in practice move to areas that have less stringent environmental and health and safety obligations. Grabosky's interest in regulation (1995: 347-369) is to show that it can have objectionable and unintended consequences, and that these can be reduced through knowledge and analysis of prior counterproductive regulation.

Various examples of regulation are referred to as having counter-productive effects. This includes "escalation" (strict regulation of new risks increasing existing risks, such as new costly emission controls in new vehicles causing motorists to hold on to their older "dirty" vehicles); "creative adaption" (stringent regulation evoking a sophisticated avoidance culture, such as in the circumvention of taxation); and "perverse incentives" (where for example the offering of rebates on waste might provide incentives for the

greater production of waste, thus having the potential of worsening the problem regulated against).

However, the two forms of examples of most interest to the writer are the "displacement" and "spill over" effects. A result of regulation is for the movement of regulated activities and industries to other areas or jurisdictions, so as to escape the regulation. In this way environmental, health and safety risks associated with industry may be transferred to less regulated areas. Businesses may move their operations to another state, where the level of regulation is more favourable to them (Macaulay, 1993: 263). A consequence may be that the displaced activity has a more deleterious effect than the original activity. For instance less rigorous standards in another state may lead to greater pollution emissions. Displacement also occurs where a substance is substituted for a banned substance. It may be that the new substance also has a harmful impact (Whipple 1985: 37-44). Andrews (1993: 529) refers to the banning of DDT out of concern for wildlife, which led to substitute pesticides more sharply toxic for agricultural workers.

There can be a spill over effect from regulation in that the regulatory burden can be shifted on to or shared by others other than the targeted group (Fisse and Braithwaite: 187-189). Minimum wage legislation for instance may benefit those in work, but reduce the prospects of work for those who are unemployed (Sunstein, 1990: 430). Downs (1973) has noted that hard line enforcement of building codes subsequently caused a shortage of rental premises. In the employment area, policies to dissuade employers from employing illegal immigrants, through the imposition of penalties on

employers, may have the effect that employers are loathe to employ people from certain ethnic backgrounds, thus causing discrimination. Objectives under the polices to preserve the employment prospects of citizens may thus have an undesirable or unintended consequence (Grabosky, 1995: 353).

Grabosky demonstrates that in this situation the persuasive aim of safeguarding the employment prospects for normal workers may cause harm to the employment prospects of immigrants generally. Grabosky concludes (1995: 364-365) that a strict analysis of regulatory policy is needed to foresee the negative ramifications of regulation, so as to prevent or greatly reduce their effect. This will result in better regulation.

4.3 The effects of labour regulation

4.3.1 Development of dual labour markets

Some argue that the regulatory impact of prescribed obligations on employers has created a dual labour market, that is, a labour market divided into a primary sector with better jobs and a secondary market with lower wages and benefits (for example, Wachter and Wright, 1990 : 240-262). The primary sector is made up of large organisations providing training, high wages and benefits, while the secondary sector consists of bodies offering low wages and prospects to their workforces.

Incentives arise for employers to go to the less regulated or unregulated secondary labour market, incorporating labour hire, which offers the prospect of decreasing or

shifting labour costs and obligations. The situation is thus an example of regulatory burden causing employers to seek an escape from that burden.

Rabin-Margalioth (2003: 311-314) argues that increasing prescribed obligations on employers in favour of employees have encouraged "dual labour markets". She acknowledges that the concept of a dual labour market is not novel, and she observes that the operation of a primary labour market and also that of a secondary labour market has been acknowledged (Wachter and Wright, 1990: 240-262; Ehrenberg and Smith, 2000: 396-412).

According to Wachter and Wright (1990: 243) the defining feature of the primary labour market is that firms and workers absorb significant investment costs, which promotes the continuance of their relationship. On the other hand, the external secondary labour market provides a reference point or gauge for the internal labour market, in supplying an alternative source of employment for workers, and an alternative supply of labour for firms. Previously it was assumed by researchers that labour market employment practices were the result of market forces, and not of regulation (Wachter and Wright, 1990a: 240-242).

Rabin-Margalioth argues that the increasing obligations created by legislation and the courts that employers owe to employees, which are described as "mandated employee benefits" or "mandates", force co-existing labour markets onto the parties participating in the labour market i.e. external secondary labour markets operating alongside core or primary labour markets.

Mandated employee benefits have not been accepted voluntarily by the parties, and are invariably non-avoidable in that the parties (employer and employee) cannot contract out of them. The benefits are any type of compulsory non-wage recompense required by regulation. These cover benefits such as workers' compensation, occupational health and safety standards, antidiscrimination prohibitions and protection from unjust dismissal (Rabin-Margalioth, 2003: 314-315). Regulation can arise either from legislation or the decisions of the courts.

4.3.2 Development of the implied contract theory by US courts

There is argument that there is a definite connection between the adoption of one mandate, the implied contract exception to the employment at will doctrine by US courts supporting permanent tenure, and the growth in the temporary help industry (which includes labour hire). This is a situation that fits well with the dual market theory (Rabin-Margalioth, 2003: 336).

The implied contract theory is one of three judicial exceptions to the employment at will doctrine, which has operated generally in the US (the other two being the public policy exception and the covenant of good faith and fair dealing exception). The judicial exceptions, which represent a form of judicial regulation, aim to prevent wrongful terminations.

The employment at will doctrine operating in the US since the last half of the nineteenth century is to the effect that, where an employee enters an employment contract which is not in writing and is for an indefinite duration, an employee can be fired by an employer

for good cause, bad cause or no cause at all (Muhl, 2001: 3-12). This doctrine is based on the view by US courts that employers and employees had equal bargaining power in an employer relationship. The parties thus can agree to an employment contract for a specified period. Where however no period is set out, because employees can resign at their discretion, employers can dismiss employees at their will or discretion.

Under the implied contract exception representations made by an employer about job security and disciplinary and dismissal procedures, that are contained in oral statements, company handbooks and other sources, are regarded by courts as contractually binding. The implied contract exception is recognised in thirty-eight of the fifty US States (Muhl, 2001: 7-10).

4.3.3 Redistribution of labour costs because of regulation

Mandated benefits create added labour costs for employers. With respect to the unjust dismissal protection for instance, Lee (1996: 549) argues that the limitations placed on dismissing permanent workers have placed much greater costs on employers than the direct costs of defending wrongful dismissal claims. Wrongful dismissal claims are not common, and their costs comprise only 0.1 per cent of total wage costs (Dertouzos and Karoly, 1992: xiii). However, indirect costs are incurred to guard against the likelihood of litigation. There are costs incurred in keeping on workers whose work standard warrants dismissal. Additional costs are incurred in vetting candidates to ensure that unsuitable persons are not hired.

As employers cannot avoid the fixed mandated benefits costs which increase their labour costs in the primary labour markets, they have a tendency to pass on these costs to the external labour market. If the imposition of mandated benefits results in the movement of employment from one labour market to another, then the regulatory process per se is helping to create a relocation of jobs between the two labour markets. This relocation results in the secondary market employees suffering as a consequence of the requirement to provide mandated benefits to standard or core employees. For example, their wages and/or benefits are being lowered to cover the costs of the mandates (Rabin-Margalioth, 2003: 314-315, 323)

Rabin-Margalioth notes (2003: 340) that, while employers could reduce the wages of standard employees, employers refrain from doing so for the sake of work morale and productivity. Downward wage inflexibility in the internal or primary labour market influences employers to shift benefit costs onto the parties in the external or secondary labour market. Because of high changeover and use of part-time workers, lack of contact between workers makes wage equity in the secondary market less significant than it is in the primary market (Bewley, 1999: 326-327).

In the primary labour market workers enjoy relative stability and higher wages and benefits, while in the secondary labour market workers have lower wages and benefits (Rabin-Margalioth, 2003: 323). Doeringer and Piore (1971: 165) emphasise that a partitioned labour market leads to unfairness. In their view workers in secondary markets (such as labour hire), as opposed to workers in the primary labour market, are

likely to experience worse working conditions, less benefits, reduced prospects for promotion, less employment protections, and less settled work histories.

The existence of mandated benefits arrangements strengthen the operation of dual labour market operations, under which employees, who are not covered by the mandated benefits, are partly subsidising, through lower wages and/or benefits, the costs of providing these benefits to those employees who are covered. This in turn reinforces the disparities in reward for work between the two groups of employees (Rabin-Margalioth, 2003: 344). Using non-standard employment arrangements, especially temporary agency employees (labour hire workers) and contract workers, may allow management to reduce wages for those employees with little negative effect on the morale of primary employees (Abraham and Taylor: 1996: 394, 397).

These preceding views are in line with the ideas of Jolls (2000: 248-249; 270-271), that employers who are prevented (even though they may have the incentive to do so), from altering wages and/or their demand for groups of employees receiving special benefits ("targeted group members"), are required to spread the costs of the benefits across all their employees. The special benefits are referred to by Jolls as "accommodation mandates" or "targeted mandates", and include protections such as workers' compensation and antidiscrimination statutory prohibitions. The result of conferring these benefits (in addition to reinforcing separation of the different groups of workers) is that all the workforce is forced to bear the cost of the benefits, even though only the accommodated groups of employees are enjoying the special benefits.

Several studies (Miles, 2000: 74; Autor, 2000: Autor, Donohue and Schwab, 2002) support the view that use of temporary help agency workers has increased, because these workers are not considered to be affected by the judicial mandate and thus are unable to seek judicial remedies for loss of employment because of the employment at will doctrine. Autor (2000; 2003: 3) calculates that twenty per cent of the growth of the temporary help supply employment between 1973-1995 (i.e. a rise of half a million workers) has been caused through the implementation of the implied contract theory in the US. The process also explains the 365,000-530,000 additional workers in the US temporary help services industry (THS) employed daily as of 2000. At the same time, the growth of temporary help employment has been five times that of employment overall.

Autor's study (2003: 1-42) refers to empirical analyses, such as those by Morriss (1995: 999-1148) and Autor, Donohue and Schwab (2001), who examine the effects of unjust dismissal principles on employment numbers and patterns. His study estimates the effect of the unjust dismissal doctrine on employment outsourcing, particularly temporary staffing (labour hire). In coming to the conclusions mentioned, he reaches what he considers an "ironic" finding (2003: 32), that judicial attempts to shield workers from unjust dismissal have promoted the development of temporary employment, where there is less job security and lower wages than in regular employment.

4.3.4 Effect of regulation on the US temporary help (labour hire) market

Peck and Theodore (2002a: 151-152) argue that the temporary help (labour hire) employment market is a product of regulation to a large degree. Its existence is linked to the more regulated labour markets, and it is revealing that it is more likely to occur in more regulated working environments, where benefits for regular employees are considerable and where termination of employment by managerial prerogative is substantially limited (Mangum, Mayall and Nelson, 1985: 599-611; Kalleberg and Reynolds, 2000). Peak and Theodore posit (2002b: 465), that the regulatory costs, related to what they call "mainstream" employment, draws more employers into using the temporary staffing option.

Peck and Theodore point out (2002a: 158) that, because temporary (or labour hire) workers are, in the eyes of the law, under the triangular employment relationship of labour hire discussed earlier, employees of the temporary staffing agencies and not those of the client firms to which they are sent to work, numerous employment protections operating under US law can be avoided by a client firm, which is released from the obligations connected with engaging permanent employees.

According to Rabin-Margalioth (2003: 336) the perceived increase of the temporary help industry arising from the implementation of the implied contract exception sits comfortably with the dual market theory. Employer organisations will be inclined to engage temporary help or agency employees, as they are less likely to seek employment protection through the courts and thus increase firing costs. This is because courts have shown themselves on numerous occasions to be reluctant to invoke the benefit of the

judicial exceptions to the employment at will doctrine for contingent workers, such as the employees of temporary help agencies (Berger, 1997: 1, 8, 28-35).

Peck and Theodore argue further (2002a: 152) that the basis of the temp industry would be weakened by a totally deregulated labour market, as then the less regulated employment circumstances applicable to the temp sector would be readily obtainable for employers. Lips (1998: 39) concludes that since temporary staffing enables businesses to utilise the services of workers without adopting the legal role of employer, temporary staffing assists businesses to evade the negative aspects of the present regulation of the standard employment contract. Accordingly, in his view, one way to dampen any increase in temp staffing, instead of regulating the industry, would be to free the standard employment relationship from regulation. In his view regulations "raise the costs of employment for businesses and, therefore, encourage the use of third-party staffing companies" (1998: 33).

Gonos (1997: 86; 1998) contends that the avenue provided through temporary help work to avoid the regulatory costs and legal obligations of regular employment is at the heart of accounting for the heavy increase in temporary employment since the 1970s. He points out (1997: 85, 86) that the main purpose behind using the temporary work (labour hire) arrangement is to break the employer-employee relationship between workers and the client organisations, at whose workplaces they perform services. Thus the client bodies can use their labour but escape from the increasing regulatory or legal obligations placed on an employer.

Allan points out (2002: 105) that, in particular, with respect to small business, some businesses are reluctant to deal with recruitment, workers' benefits, workers' compensation and unemployment insurance claims, and transfer those functions for a fee to temporary staffing agencies, who may achieve cost savings through economies of scale.

Allan observes however that employer hopes about cost savings may not necessarily eventuate, because employers usually do not have information (such as on training costs) on the performance and cost-effectiveness of contingent workers (Barker and Christensen, 1998). Should employers ever doubt the cost advantages of using contingent workers, they are likely to cut back or abstain from using these workers. Allan, nevertheless, earlier notes, however, (2002: 103) that the contingent workforce is a large and significant part of the US workforce. There are predictions that the temporary workforce will increase at a faster rate than the permanent workforce in coming years (Feder, 1995: 37).

In light of the foregoing the use of temporary (labour hire) workers in the US accordingly appears to represent an effective way for organisations to shift work from the primary or core labour market into the secondary labour market.

4.4 Contractualisation of employment arrangements as a reaction to regulation

4.4.1 Theory of contractualisation of employment arrangements

On the issue of regulation of employment relations, Trudeau (2003: 137-160) argues that there is a trend in North America (the US and Canada) towards a return to

individual freedom of contract principles and sanctioned negotiation between labour and management, with reduced government intervention. Trudeau argues that contractual solutions are being used in North America to evade regulation. In his view two factors in particular are responsible for this trend.

The first factor is a shift in the balance of power between labour and management, in favour of employers. This is due in large measure to their greater capacity to lobby and influence government to adopt pro-business policies, by arguments that international market pressures require greater flexibility in local labour markets to create competitiveness and encourage foreign investment.

The second factor is that the State has lost its authority to be the only source for regulation (Arthurs, 1996: 1-45). The complex nature of matters to be regulated (for instance balancing concerns for competitiveness and employment growth) and the need to gain acceptance and co-operation requires the State to involve labour and employers into the development and carrying out of policy, for example, labour training and occupational safety issues.

This process is called "the contractualisation of labour relations law". Employment issues, which were previously controlled by legislation and the courts, are now allowed to be dealt with by negotiation between labour and management, or by the individual contract of employment.

The process can be regarded as a turning back from the way in which labour law has developed (Trudeau, 2003: 137-138). Labour law was developed by removing features of the contract of employment relationship and having them controlled by mandatory legislative requirements or conditions. Trudeau posits that contractualisation works in the opposite way. Matters formerly regulated by law are now transferred into the contractual domain. For example employers and unions are now permitted to negotiate the content of legal mandates.

Supiot (2002: 25) remarks that "The object of negotiation is thus to lay down the law and the only object of the law is to give legal force to an agreement". In Supiot's opinion the State lays down general aims in law but leaves it to labour and management to carry out these objectives. More sharply contractualisation may indicate that an employment issue is removed from legal regulation and left to individual freedom of contract principles. The general effect is that contractualisation gives the market primacy before the law.

It is argued that there must be a change in the regulation of employment relationships at workplace level. Because now a lesser number of workers conform to the paradigm of a full time permanent worker with one employer, because more are self-employed or temporary workers, a new regulatory system is needed to deal with the different employment relationships that have arisen (Lowe, 2002: 93-104).

4.4.2 Regulation of labour law in North America

Collective bargaining (recognised negotiations between employers and unions) has been the fundamental method of regulation of the employment relationship in the United States and Canada. In Canada, apart from federal control over special activities, the provinces have jurisdiction over labour relations, in contrast to the US where the jurisdiction is federal (Trudeau, 2003: 138, 139). Labour law is in fact quite similar across the Canadian provinces (Carter, England, Etherington and Trudeau, 2001). Canadian labour law has its foundations in the framework laid down in the US by the *1935 Wagner Act* (Arthurs, 1996: 36).

Unlike the position in Europe, the North American collective agreement comprehensively deals with all the terms and conditions of employment (eg wages, holidays, employee rights and benefits such as seniority rights, hours of work, job security and management rights such as the right to discipline a worker). Importantly, an individual contract of employment between and employer and an employee cannot contain terms at variance with the terms at negotiated in the relevant collective agreement.

In North America, collective bargaining only takes place between management and unions certified to represent particular groups of workers. It does not apply to a whole industry, but only a single employer or enterprise. Where workers are not so represented, their employee interests are governed by the common law dealing with the individual contract of employment.

Collective bargaining was primarily directed to the traditional fulltime employee working for large businesses in the primary and manufacturing sectors under the direct supervision of an employer on the latter's premises (Gunderson and Riddell, 2000). Because of lack of union coverage, collective bargaining has never applied to the majority of workers, and the number of employees covered by collective bargaining has been steadily falling. For example, the percentage of private sector employees covered by collective agreements (because they are unionised) in the US has gone from almost 40% in the 1950s (Weiler 1993: 84) to less than 10% in 2001 (Girard 2002: 4), with the overall percentage of US workers covered being about 15% today.

Similarly, in Canada there has been a slide in the number of private sector workers covered by collective agreements because they are unionised, from a high of 38.8% in 1984 (Kumar 1993: 12-13). Girard reports (2002: 3-4) that overall coverage in Canada, apart from Quebec, was 32% in 2001, with an 18% rate in the private sector. The corresponding figures for Quebec were 40.7% overall, and 27.9% in the private sector.

4.4.3 Indirect or "passive" contractualisation of labour law

It is argued that individual employment law is being subjected to "passive contractualisation", because of the considerable change in the composition of the labour market (Trudeau, 2003: 146). As with collective labour relations law, the influence of individual employment law is reduced by the movement towards self-employment, which will remain the case while the protection of labour law is only relevant for employed workers (Trudeau, 2002).

Workers in North America, whose interests are not represented by a certified union, cannot avail themselves of the advantages of collective bargaining and must rely on the common law (in Quebec the civil law), with its freedom of contract rules. This shift from collective bargaining to the individual contract of employment should be viewed as leading to a type of contractualisation of the law (Trudeau, 2003: 140).

Unionisation has declined due to a number of factors. For example, there is the failure of labour law to keep up with the structural changes going on in labour markets, such as the considerable rise in non-standard or atypical jobs, which includes part-time work, temporary work (of which labour hire is a form) or independent contracting. Other factors are the introduction of new production and management methods (such as the just-in-time ordering of supplies) and information technologies, and the changing of the American and Canadian economies from those based on manufacturing industries to service industries.

4.4.4 Direct or "active" contractualisation of labour law

In the US and Canada overall the legal rules relating to the individual contract of employment are based on the common law. The employment relationship arises from an individual employment contract subject to general contract principles. There are an increasing number of laws imposing compulsory employment conditions, that limit the freedom to contract.

Nonetheless, features of individual employment law have been contractualised in recent times, with the Quebec experience being an example of this. There have been separate cases of contractualisation there, which in totality are important. Some mandatory rules have been dispensed with, while at the same time employment laws have been passed setting out broad objectives, but leaving it to the parties to determine how these are carried out or negotiated (Trudeau, 2003: 145-148).

Reference is made by Trudeau to non-unionised workers who were affected by legislative amendments in 1996, which removed the benefit of mandatory industry conditions established by government decree (such as in the clothing industry). The result is that those workers now have to rely on the conditions of an individual employment contract, and the minimum legislative standards under the Act respecting Labour Standards. This can be regarded as an obvious case of contractualisation.

Governments in the United States and Canada have contributed actively to the trend towards contractualisation of the law. An example is cited by Trudeau of the amending of the Labour Code in 1994 in Quebec to end the three-year maximum period of collective agreements, which comprehensively cover the mandatory terms and conditions of workers (Trudeau: 2003, 142). This would mean in practice that, if the duration of collective agreements are extended, then it normally will be longer before the conditions of employment in the agreements can be renegotiated.

There is employer sentiment that longer agreements aided workplace stability, better scope for planning and labour costs restraint. Labour unions saw them as a direct threat

to their negotiating powers, and a worsening of employment conditions, which would lead to a fall in the quality of employment conditions negotiated and union support.

The legislative move by the Quebec government results in a kind of contractualisation of labour law, in that an important feature of the collective bargaining system (the duration of collective agreements) is no longer regulated by government, but left to the discretion of the parties in the agreement. The trend to contractualisation can be seen also in the actions of the Quebec government in delegating powers to employers and unions (in the form of an Occupational Health and Safety Commission) to determine the detail in occupational health and safety regulations through consultative processes (Trudeau, 2003: 148-152).

A somewhat similar approach has been adopted with respect to employment training, with the setting up of a Labour Market Partners Commission, where representatives of labour and employers help to determine manpower needs and objectives, and how training funds are to be spent. In this way, government lays down general objectives by an Act and leaves it to unions and management to work out how to achieve objectives.

Labour law is seen as leading towards contractualisation and the move towards contractualisation of labour law has been argued to be not a form of de-regulation of industrial relations, but as a form of "re-regulation" of industrial relations. The move has come about through the inability of the State to adjust labour law to the new labour market, and a shift in the balance of power to employers, at the expense of labour. Also

the complicated nature of labour issues calls for the State to involve labour and management in dealing with such matters. The result is that matters formerly the subject of State intervention now are placed under the influence or control of labour and management, or left to individual freedom of contract (Trudeau, 2003: 152-154).

Whether the developments outlined by Trudeau can be described as re-regulation or de-regulation, it is considered that the developments are really attempts to evade the previous system or systems of regulation that existed. Increasing regulation means that employers will look to solutions like contractualisation.

It could be argued that the greater the exercise of contractualisation in the primary or traditional labour market, the less incentive there is for the use of labour hire. Where in the estimation of employers there is a flexible contracting system for them in the primary or main employment market, there is less need for them to seek greater purported flexibility through the use of labour hire, which is really a different form of contractualisation.

Contractualisation implies a greater freedom through the terms and conditions of the employment relationship, which is the same thing that is achieved through the use of labour hire agencies. Under a labour hire arrangement, substantial freedom or flexibility is obtained by a client company in the use of labour, in that instead of being concerned with a regulated employment relationship, essentially all the hiring client company has to worry about (apart from occupational health and safety issues) is contracting with the labour hire agency.

In light of the preceding, it could be argued that increasing regulation is likely to result in companies looking to contractualisation. The view could be taken that contractualisation and labour hire in particular are two procedures for evading regulation, and being involved in deregulation. Contractualisation then is actually another example of how people are adopting different processes to avoid regulation. Labour hire in particular is a special or different form of contractualisation, where the staffing agency and client organisations essentially control the relationships through their contracting with one another.

4.5 Empirical studies on the effects of regulation on US labour markets

4.5.1 Houseman study

Houseman (2001) sets out the results of a large US survey on why employers use flexible staffing arrangements and in particular agency temporaries.

Houseman presents the findings of a nationwide survey of private sector employers in the US, sponsored by the Upjohn Institute for Employment Research, into the extent of use of flexible staffing arrangements by employers, and the reasons why they are used.

The purpose of Houseman's study is to explain why employers use contingent or flexible staffing arrangements. The investigation in this thesis has a similar objective, that is, why employers are motivated to use contingent working arrangements in the form of labour hire. This thesis also studies how labour hire arrangements presently

operate and are regulated in Australia. There are no previous surveys of this nature done in Queensland and the writer is doing the first Queensland survey.

The survey that Houseman refers to was conducted in the form of a nationwide telephone survey by the Kercher Center for Social Research at Western Michigan University in July and August 1996. A random representative sample consisting of 550 mostly private sector employers was selected, and the employers were questioned on whether they used five flexible staffing arrangements: temporary agency (or labour hire) workers, short-term hires (persons employed directly by an organisation for a limited period), regular part-time workers, on-call workers (persons called to work only as needed), and contract workers.

The sample group of employers were taken from an extensive list kept by the American Business Information Inc (ABI). The sample covered establishments with widely ranging employee levels from less than ten to five hundred or more, with the proportion of different sized establishments representative of the number of those establishments generally. About half of the people contacted (such as human resources managers and owners) agreed to the subsequent telephone interviews, in which the great majority of interviewees were able or willing to give answers to questions.

4.5.2 Houseman, Kalleberg and Erickcek study

Houseman, Kalleberg and Erickcek (2003: 104-127) provide empirical evidence which support Houseman's previous survey conclusions. They examine case study evidence drawn from in-depth interviews carried out in six hospitals and five auto parts

manufacturers in 1999 and 2000. They use that evidence to ascertain why employers maintained and even expanded the use of temporary help (labour hire agencies) during a tight labour market period (of low unemployment) in the 1990s.

The participant organisations were selected from a service industry and a manufacturing industry, that occupied leading positions in the US economy, and that engage a great number of workers (including inter alia agency temporaries) in non-standard work arrangements. The hospitals selected were from different regions of Michigan and North Carolina, and varied in size from a hospital with 450 employees to one with 6,000 employees. As for the auto supply companies, while all were from the Midwest, they differed as regards size, union presence and structure, and employed from 430 to 2,100 employees. Two of the auto supply organisations were locally owned, one a branch of a larger US company, and two were subsidiaries of foreign owned companies.

Interviews were conducted with human resources directors and managers in charge of nursing and other staff and production workers. Interviews were also carried out with representatives of the agencies supplying staff to the organisations. Focus groups were also conducted with full time and agency employees at some organisations. Finally data was obtained from each participant body on details such as the use of agency workers and wages and benefits paid, including the rates paid to agency workers. A drafted set of questions was used for each interview in the two industries, with follow up questions used to seek clarification or further information. All the interviews were tape recorded and transcribed.

4.5.3 Kalleberg, Reynolds and Marsden study

Kalleberg, Reynolds and Marsden (2003: 525-552) make findings from an examination of a large representative survey of US establishments, the second National Organizations Study (Kalleberg, Knoke and Marsden, 1995: 32-49), concerning flexible staffing arrangements (such as temporary, contract or part-time work). The survey analysed was wide and representative data of establishments from different size groupings (in particular many medium sized and large organisations) obtained by a computer-assisted telephone interview survey of managers, by the Minnesota Centre for Survey Research in 1996-1997. Establishments were randomly selected from a list provided by Dun and Bradstreet Information Services of about 15 million US establishments, so as to get a final sample representative of the establishments employing US workers. In the process most interviews took place with human resource managers.

4.5.4 Similarities in the findings of the studies

There is agreement in the three studies that the use of flexible staffing arrangements is widespread and will increase. Houseman concludes that the use of flexible staffing is commonplace and, in particular, the high use of agency workers has continued.

Houseman (2001: 149, 166-169) arrives at findings that suggest that employers use agency temporaries to fill positions both in times of high and low demand. She finds overall that the use of flexible staffing arrangements by US companies is commonplace. Of those surveyed, 72% had used part-time workers and 78% had utilised some other form of flexible staffing. The attractions in benefits for employers in a secondary

labour market are shown by the survey results, which reveal a widespread view amongst employers that organisations in their industry would increase the use of flexible staffing arrangements such as agency temporaries in the following five years.

Further comparison with a survey conducted ten years earlier indicated that the high degree of usage of agency temporaries (labour hire workers) had continued. This trend is in line with the general attitude amongst the surveyed employers that flexible forms of staffing will continue to increase. Two-thirds of those surveyed (Houseman, 2001: 167) agreed to the proposition that employers in their industry would use more flexible staffing methods such as agency temporary (labour hire) workers in the next five years.

Houseman, Kalleberg and Erickcek (2003: 25) find that the use of agency workers is increasing in tight labour markets, where establishments resort more and more to using temporary help agencies to fill vacant positions.

Kalleberg, Reynolds and Marsden reveal that most US organisations use flexible workers. Analysis of data by the commentators show that fewer than one in five US organisations employ only full-time workers in some of their areas.

Significantly there is a consensus in the three studies that a major reason for the use of flexible staffing is to reduce labour costs. Houseman's findings provide support for the views of Rabin-Margalioth (2003: 311-344), that employers are turning to contingent labour to avoid mandated costs associated with standard labour. Houseman's empirical

study points to employers using contingent workers such as agency workers, inter alia because of the lower costs of these workers compared to standard employees. Houseman notes (2001: 161) that, while most full time regular employees are provided with paid vacation and sick leave, pension benefits and health insurance, few of these benefits were provided to contingent workers.

Houseman (2001: 167) finds that using flexible staffing arrangements reduced labour costs considerably. When benefit costs were taken into account for the arrangements, the majority of establishments reported that hourly wage costs plus benefit were lower for staffing arrangement employees, than for regular employees holding similar positions. Perhaps this explains why a majority of agency temporaries in a quoted Current Population Survey (CPS) declared their preference for regular jobs (Houseman and Polivka, 2000), suggesting to the author that there was a notable disparity or lack of correspondence between the preferences of employers and the employees regarding flexible staffing arrangements.

Information from the survey (2001: 159-161) indicates that wages and in particular benefit costs in many cases were less for workers in the different categories of flexible staffing arrangements. In particular, in respect of agency temporaries, 38% of employers surveyed disclosed that the hourly billing rate for them was less than the hourly wage and benefit cost of regular workers, and only 19% indicated the opposite. The lower costs of the arrangements thus make them more appealing to business bodies.

Houseman notes (2001: 156) that numerous persons (such as Krueger 1991) consider that the increase in legal actions has added greatly to the expense for companies of firing employees. In comparison, an employee on a fixed-term contract or hired through a temporary help (labour hire) agency can be dismissed with minimal risk of legal action.

Houseman, Kalleberg and Erickcek find that the lower costs associated with agency workers make the use of agency firms an attractive choice for business. Their evidence indicates that employers paid agency workers more than regular employees mainly to have extra time to recruit permanent employees and, in this way, to avoid increasing wages for new and existing employees. In contrast for low-skill positions the evidence indicates that temporary agency workers in hospitals did not have higher compensation, while in production auto positions they received substantially less. As with high-skill occupations the use of agency temporary employees reduced pressure on organisations in tight labour markets to increase employees' wages.

In light of their findings the commentators argue that companies were encouraged to use agency workers because of the lower costs associated with engaging and dismissing them.

A subsidiary factor for the use of flexible staffing is the flexibility that it gives to organisations to adjust their workforce numbers according to workload fluctuations and

labour supply. This emerges from the Houseman study and the Kalleberg, Reynolds and Marsden study.

Houseman finds (2001: 149, 166-169) that, inter alia, the need to adjust workload fluctuations and to cope with the staff absenteeism were the major reasons given by employers to use contingent work arrangements, and that using agency temporaries and part-time workers were useful means of screening for permanent positions (though it seems that in practice few contingent workers were promoted into permanent positions).

As to the probability of the use of flexible staffing arrangements by organisations, Houseman and Kalleberg, Reynolds and Marsden both find that there is a correlation between the size of organisations and the greater use of flexible staff. Kalleberg, Reynolds and Marsden find that organisations with a greater number of full-time employees are more likely to have recourse to all flexible arrangements (temporary, contract and part-time). Houseman finds (2001: 165) that there is a correlation between the size of employer companies and greater use of agency temporaries (which confirms anecdotal evidence).

A downside to the attraction of reducing lower labour costs, according to Houseman and Kalleberg, Reynolds and Marsden, is that the motivation to reduce costs will result in continuing low wages and benefits for workers in flexible staffing arrangements.

Houseman (2001: 155) opines that employers may use flexible staffing arrangements so they can pay some groups of employees lower wages or benefits. She gives the

example of a unionised company paying above market wages, that may be attracted to the idea of using temporary agency (labour hire) workers or contract employees, for whom it is not the legal employer and with whom it does not have a collective agreement.

Kalleberg, Reynolds and Marsden contend that, if organisations are essentially motivated by cost factors to use flexible staff, the people in those jobs are likely to receive low wages and miss out on fringe benefits. If, however, organisations adopt flexible staffing arrangements to vet possible future employees or to have flexibility in the face of changing labour supply, then job positions under the arrangements may be comparatively remunerative (2003: 547).

4.5.5 Differences in the findings of the studies

The studies are largely compatible and arrive at similar conclusions about the use of flexible staffing. One point of divergence between the studies relates to the motivation to reduce labour costs as a factor in the use of flexible staffing. In the Houseman survey, only a minority of organisations mentioned this as influential in the use of flexible staffing arrangements. Houseman, by the use of other data, is able to show that the desire to reduce costs is a relevant factor. Multivariate analysis of the survey data by Houseman (2001: 162-166) suggests that cost savings are a strong factor not only in the use of flexible staffing arrangements by employers, but also in respect of the extent of use of these arrangements. In contrast, in the Kalleberg, Reynolds and Marsden study, organisations admit to using flexible staffing to reduce costs.

Houseman, Kalleberg and Erickcek made their own particular finding that resort is made by business to agency workers in tight labour markets (when employees are in short supply). Because of her particular focus, Houseman concludes that existing laws have caused increased interest of employers in flexible staffing arrangements.

In conclusion, there is considerable evidence to suggest that increasing government and judicial regulation of the standard employment situation has encouraged the development of a secondary labour market of contingent workers, such as labour hire, where labour costs are lower for the users of that labour. To summarise, regulation of the primary labour market has had the consequence, that there are incentives for employers to go to less or unregulated markets (such as the labour hire market), to avoid employer obligations such as unfair dismissal and health and safety laws. These results prompt the question, whether there would be similar results or findings as to the effects of regulation on the standard employment relationship in Australia (in particular Queensland). Evidence on this issue will be set out in the later chapter dealing with research on the operation of labour hire.

Chapter Five

Methodology

5.1 Introduction

This chapter describes the research methodology used to carry out the empirical research for the thesis. The research is in the form of a qualitative study. It involved almost fifty (forty-nine) in-depth field interviews predominately of labour hire agencies, but also of peak business and union bodies, smaller unions and some individuals. What is of particular importance is that, as far as the writer is aware, there has been no previous empirical work with labour hire agencies of this nature done in Australia and the writer has done the first Australian study.

There have been some limited case studies touching on labour hire by the Australian Centre for Industrial Relations Research and Training, and some quite limited investigation for the Australian Industry Group (AIG) into emerging attitudes towards labour hire. The writer's empirical fieldwork is much more extensive in that it involves across the board in-depth interviewing of the important parties involved in the labour hire field.

5.2 Qualitative research through the interview process

Because there is little information on how labour hire agencies do their business and regulate their activities, an aim of the writer's research project was and is to gather and analyse information about the way in which labour hire companies operate. In particular, the aim was to get a clear picture of how labour hire agencies operate in practice, which would provide a research question, issues and data. The aim in other words was to obtain empirical data that could highlight or generate legal issues for the purposes of research. It was considered that this could be best done through carrying out empirical research of the agencies via the interview process, to obtain a good description of what they do in practice and how they do it.

Information was elicited in the exploratory studies of the labour hire agencies using taped planned interviews of senior officers or owners of the agencies. There was also the intention (which was realised in a number of cases) of obtaining copy documents from the agencies relating to the terms and conditions on the supply, payment and control of staff hired out. The upshot was that the author was able to study organisations, contracts and arrangements.

5.3 Confidentiality in the interview process

No names of the interviewed parties or individually identified data were recorded, and all data was grouped for analysis. Codes for the data were used to protect confidentiality. The raw data tapes were destroyed on completion or finalisation of the transcription of the interviews.

5.4 Ethical clearance and considerations

The empirical study and the interview documentation were cleared by one of the human ethics committees of the University of Queensland in accordance with the National Health and Medical Research Guidelines. The University of Queensland clearance is attached as Appendix A in the Schedule to this study. No apparent ethical difficulties arose during the course of the interviews. An ethical consideration or problem, for example, could have arisen where clear or blatant breaches of legislation by a participant were revealed during the interview process.

It could have been the case that breaches of occupational health and safety legislation could have been revealed, that is a lack of training which could lead to injury at the workplace. In that situation, the writer would have had a responsibility or obligation to indicate informally to the participant organisation its duty of care and statutory duty to remedy the situation. After the conclusion of the interview, the intention of the writer was to mention informally to the interviewee for the information and benefit of the agency that there might be a contravention of State legislation.

As it turned out, no ethical problems arose out of the interviews. For instance, agencies invariably were at pains to indicate that they were conscious and vigilant about their health and safety duties and obligations. In the odd case, an agency might have intimated that, because of distance or geographical factors (such as where employees were in isolated parts of Queensland), it was limited in its action by what was

reasonably practicable. No agency gave any indication of deliberately attempting to evade legislation.

The writer observed confidentiality and trade secrets of a participant body. How this consideration was addressed will be described in the section dealing with the interview procedure.

5.5 Contacting potential interview subjects

The first stage involved contacting a senior officer of the organisation by a pro forma approved letter (together with a subject information form) in which details of the writer's formal research project are set out. This letter is marked Appendix B in the Schedule to this study. Permission was then sought to interview a senior officer of the organisation at a time convenient to him or her, in order to obtain an understanding of how labour hire arrangements are conducted by the organisation or firm. The senior officer was advised that any interview/s will be taped and codes will be used to protect confidentiality.

An undertaking in the letter was given that any information obtained from discussion with the person would be used with discretion and confidentiality. It was pointed out that the writer has obtained an ethics clearance from the University, before conducting any research involving human subjects, and that the University's ethics guidelines for research require confidentiality, anonymity and the right of a subject to withdraw at any stage. The senior officer was then advised that if he/she agreed to be interviewed, then the writer would be happy to send the officer a transcript of the interview for checking.

This latter procedure was in fact the invariable practice adopted by the writer. Where changes to a transcript were requested or made by a subject, an amended transcript was sent to the person concerned. The officer concerned was told in the letter that the officer would be contacted by telephone by the writer in the next week or so, with a view to arranging a time for interview convenient to the person. Participants if they so desired were provided with a copy of the interview questions in advance. The letter concluded by giving contact details of the writer's supervisor at the University.

The accompanying subject information form or sheet to the letter (marked Appendix C in the Schedule) provided background information to the research project. It set out the project title, the interested parties, a description of the aims and procedure of the research project, the foreseeable benefits of the study, the confidentiality and participant conditions, the fact of ethical clearance and the provision for feedback via a typed transcript of the interview.

At the interview as part of the preliminaries, the interviewee would be shown the list of interview questions that would be asked and asked to sign a participant consent form and participant authority/recognition form. The interviewee would then be told that the formal interview would commence, and that it would be taped for transcription purposes.

Interviews lasted (and were planned to last) on average about an hour. Interviewees

were encouraged to deviate from the set questions, and make additional comments and insights on labour hire where they so desired. The writer often would pursue issues with the participants that arose from the standard questions.

After the interview process the participant would be sent a copy of the transcript of the interview for attention and possible amendment. The participant was advised that if nothing further was heard, it would be assumed that the participant was happy with the transcript. Copies of the pro forma letter, subject information form, interview questions, participant consent form and participant authority/recognition form are contained in the schedule.

The confidentiality and trade secret interests of a participant body were protected as follows:

- No names of participants were to be mentioned in publications or the thesis
- Codes were assigned to the transcripts of the interviews
- Tapes containing the raw data were destroyed after transcripts were made
- Transcripts were kept securely

The main risk to a participant, that is envisaged, would be where the confidentiality of the participant's information is breached through the divulging of that information to another competitor or person, and as a result, the participant is dismissed or punished by the organisation.

After the effort in setting interviews up, the interviews almost without exception went smoothly. In some cases, the participants were only too eager to offer some information and assistance, in the hope of having the industry "cleaned up".

Other participants were eager to paint a positive view of the industry, and to maintain the position that the industry should be left to self-regulation. There was only one instance where consent to use a transcript of an interview was withdrawn, on the basis that information had been divulged, which in hindsight the participant did not want released.

5.6 Representativeness

As a preliminary step a peak body for labour hire agencies in Australia was consulted to provide a list of its members in Queensland and Northern Territory specialising in labour hire and labour placement. This list provided a useful starting point for the contact of labour hire agencies in Queensland.

The writer added to the list other agencies that advertised in the Yellow Pages telephone directory. A judgment call was made in the initial selection of agencies for contact, based on the industries they serviced and their varied geographical location in south-eastern Queensland. In the end result it is considered that a good "snap shot" of the labour hire industry in south-east Queensland (particularly Brisbane) was obtained, in that the writer was able to interview large international and national labour hire agencies

that catered for several industries and had branch offices across Australia, and smaller "niche" firms that catered for a particular industry or profession.

Importantly at an early stage of the thesis, the writer was able to conduct in-depth interviews with the two peak bodies representing the interests of labour hire businesses in Australia. These interviews revealed the strategies in place for the self-regulation and protection of the labour hire industry in Australia.

To obtain a balanced perspective on the area of labour hire, a number of interviews were conducted with peak union bodies and miscellaneous unions. The peak union bodies in particular referred to strategies to combat what were considered the undesirable aspects of labour hire.

Where a labour hire agency declined to take part in the interview process, the usual excuse related to time commitments or occasionally, lack of interest. One labour agency withdrew consent after having been interviewed. Approximately eighty percent of agencies contacted agreed to be interviewed.

Chapter Six

Research

6.1 Introduction

This chapter aims to give an outline of the participants and their responses during in-depth interviews on the operation of labour hire. To improve comprehension the data has been set out under key headings. Summaries of findings are included in this chapter. Conclusions and implications are set out in the following chapters.

The data below that has been collated and analysed draws attention to several key issues, which have significant implications for the legal regulation of labour hire. These issues can be summarised succinctly in the following terms:

(i) increasing regulation of the standard employment relationship has had the effect of adding costs and obligations on employers;

(ii) as a consequence employers have incentives to go to less regulated or unregulated labour markets such as labour hire, which offer escape from regulation such as the unfair dismissal laws;

(iii) the movement to labour hire is encouraged by the largely unregulated nature of the labour hire industry, and perceived benefits in using labour hire such as flexibility in the engagement of staff and reduced costs;

(iv) the legal and practical problems that may arise given the unique tripartite nature of labour hire when it is utilised for a labour hire agency and client organisation, arising from the sharing of control and responsibilities for a labour hire worker.

Attention now will be devoted in this chapter to exploring empirical information which relates to these key issues.

6.2 Profile of Participants

As described in Chapter Five, labour hire agencies were selected in South East Queensland to provide a representative sample of existing labour hire agencies. A total of 34 agencies were interviewed and asked a series of set questions, with the opportunity provided to add additional comment. A total of 12 peak and ordinary unions were also interviewed and asked to respond to some broad issues that related to them. In addition peak business bodies in the recruitment and labour hire field were interviewed at some length and asked to comment on the interview questions given to labour hire agencies. To obtain a unique perspective on labour hire three individual labour hire workers were queried at some length and asked to give their views on labour hire as it affected them individually and others collectively.

6.3 Survey Response

With respect to the 17 survey questions asked of labour hire agencies, this study concentrates on the responses to nine key questions relating to labour hire so as to obtain an overall view of the participant agencies' views and opinions of labour hire in practice. The study in turn also deals with the responses of the union participants to four key questions relating to union attitudes to the phenomenon of labour hire and its

implications for employment generally. The two business bodies for the labour hire industry were questioned in depth as to the operation of labour hire in Australia. The three participant labour hire workers were asked to give their views on how working in labour hire has affected them and their colleague workers.

Participant responses are analysed by reference to relevant and key issues.

Labour Hire Agencies' Views and Opinions

The following headings directly relate to the previous issues/hypotheses that were outlined above. These issues will be further elaborated on in the subsequent analysis chapter.

This study concentrates on agency responses to nine headings which provide information on the key issues mentioned earlier in the chapter. These issues are:

(i) The benefits of labour hire

(ii) Clients/industries catered for

(iii) Why work in labour hire

(iv) Typical arrangements initiated

(v) Negotiation re terms and conditions in labour hire

(vi) Do disputes arise in labour hire

(vii) Occupational health and safety issues in labour hire

(viii) Anti-discrimination issues in labour hire

(ix) Reasons for the expansion of labour hire

These issues will be dealt with in turn below.

In carrying out the study, there was interest by the writer as to whether responses to the survey questions would unearth findings about Australian labour market changes and circumstances, which would be similar to the North American experience. In particular the writer was interested in investigating findings to the following questions:

- Are labour market changes in Australia, and particularly in Queensland, similar to the North American experience?
- Are increasing labour costs and regulation (as well as economic factors) encouraging employers into using less regulated forms of employment such as labour hire, referred to as temporary staffing in US terminology?
- Is the virtual lack of regulation of the labour hire industry encouraging a greater use of labour hire arrangements?
- Are occupational health and safety (OHS) issues problematic in labour hire employment, in the light of the division of legal and practical control of a worker between a labour hire agency and the client or organisation using the worker.

The results of the responses to the interview questions will provide answers to those questions.

The reporting of the results of the interviews is split up along the following lines:

- Quantitative responses about labour hire coverage, the nature of labour hire arrangements, disputes, OHS and workplace discrimination.

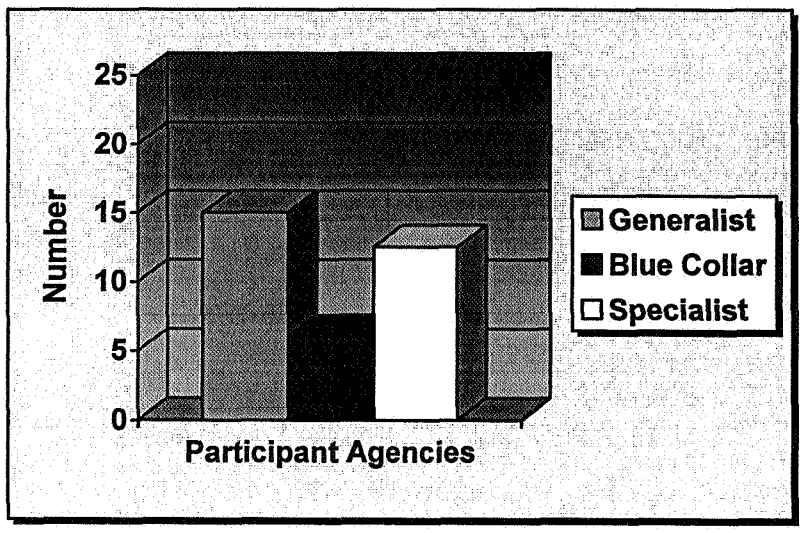
- Qualitative responses about the benefits of labour hire.
- Reasons for the expansion of labour hire.

6.4 Quantitative Responses

6.4.1 Clients/industries accounted for by the agencies

In terms of the clients and industries that they cater for, the labour hire agencies interviewed could be broadly divided into three categories:

- Generalist agencies that cover services across the board or support services to industry. With services covered across the board, they may include professional, clerical (or "white collar") staff, and administrative support staff.
- Agencies catering for the blue collar/industrial/factory markets
- Specialist/'boutique' agencies catering to specific segments of the employment market.



Generalist Agencies

Of the fifteen generalist agencies mentioned in category 1, a further subdivision can be made into those agencies that are of a large multinational or national nature that cover virtually all areas of the employment market. For instance some large multinational agencies indicated that they had a very wide spread geographically and industry wide in Australia or Australasia, covering diverse areas such as manufacturing, construction, banking and financial services, the IT sector, call centres, clerical, secretarial and trades. In addition their clients included various levels of government, who outsource their requirements.

One multinational agency commented "the agency is a broad based organisation that covers all industries and all management disciplines. In terms of size we would employ 1,800 staff in Australasia, "the agency has developed a very good internet strategy, global internet strategy and that is what has driven our growth".

One large international labour hire firm operating in Australia mentioned that it had a foothold in the British employment market. It stated that, in addition to its branches in Australian capital cities, it had a large market over in the United Kingdom through its London branch, particularly in banking and finance where itinerant workers are used.

Overall the generalist agencies exhibited similar patterns of operation. They covered a wide range of callings (in particular support services) and industries, and employed an even spread of males and females. To build up client bases, they utilised advertising and marketing, for example knocking on doors, word of mouth, the internet, and the "yellow pages" in telephone directories. They also seemed to go for high volume

placements, and to cater for workers in the salary range of $20,000 to $50,000 per annum.

One generalist agency highlighted the volatility of the labour hire industry, when it revealed that the emphasis in its generalist coverage varied from time to time, according to demands and trends. It described the progression of its coverage as being in the 1980s mainly involved with computing placements (for independent contractors), then moving on in the 1990s to be heavily involved with white collar and professional areas. In recent times the emphasis changed yet again for the agency, with a heavy shift into industrial labour hire.

Industrial agencies

The second category of labour hire agencies (consisting of six agencies) operate essentially in the industrial area.

The agencies considered industrial work to cover a large area of the labour market, and they referred to it as covering work such as construction, maintenance, factory and process work, boilermaking, warehousing, landscaping, and work for local councils. This type of work called for a range of skills from basic to semi-skilled and skilled. In some cases people with no skills were hired to do easy work in large stores, factories and smaller construction sites. For heavy labour the agencies employed mainly males because of the nature of the work, whereas a majority of females were process workers in factories.

Because of the nature of the workers they supplied, the industrial (also referred to as "blue collar") agencies overall were involved in high volume, small margin business which relied on having hundreds of workers hired out in order to be profitable (for example, many boilermakers were hired out when there was a lot of engineering work being carried on).

Specialist agencies

The third category of agency (totalling thirteen) were agencies offering specialist services to companies. The labour hire agencies or firms focused or specialised in supplying workers to particular or specific niche areas of the employment market in Australia and even overseas, where they had specialist knowledge.

The agencies supplied a wide range of professionals from engineers and architects to lawyers, accountants and financial planners, and staff such as chefs, waiters and waitresses for the hospitality trade. Thus depending on their expertise the agencies might supply technical and engineering staff for projects, financial services staff to banks and financial institutions, and staff to large corporations and government departments. The ratio of male to female employees for the positions was open, in that the focus was on getting the best person for the job.

One speciality emerging area was the hospitality and security industry. Three of the specialist agencies specialised in providing labour hire staff (for example to hotels) in that industry. It was pointed out by an agency that client companies could take

advantage of the training and public liability insurance provided by a security firm or agency, who supplied staff.

A passing reference was made by one agency to the special situation, where some construction companies actually have established their own agencies to help with the supply of labour hire professionals for their projects, apparently on the assumption that the supply of staff should be related directly to industry knowledge, and what people do in the industry. If this is the situation, then this approach marks a further development in the way that labour hire is utilised.

6.4.2 Typical labour hire arrangements

(a) How labour hire arrangements are initiated

All of the thirty-four agencies interviewed confirmed that the standard invariable commencement to a labour hire arrangement or relationship was the initial request or inquiry to an agency by a client, about the availability of a labour hire employee/s to perform work for the client. This then set in train searches by an agency to see whether it had a person or persons on its database or register that would fit or satisfy the client's request. The agencies referred to this process as "mixing and matching". In many cases the client does not interview the candidate, and relies on the agency's judgment. One agency put it "we're an extension of their human resources".

The mix and match process started with the building up of a database or register of workers. The interviewed agencies in anticipation of a request for employees from

clients have built up a database of likely employees, whom they have interviewed, investigated, inducted and trained. As one agency put it succinctly: "The idea of the labour hire is that you've got the people on your books or database, ready, willing and able for a project or work tomorrow".

The agencies in general indicated that they built up their databases or registers of employees and their business in various ways, ranging from using inquiries from prospective employees, advertising, referrals, networking and marketing. Advertising by the agencies tended to be selective, and reserved for when mass recruitment was wanted or a particular type of worker was required. A common observation was that employees naturally tended to stay with agencies that supplied them with regular work. As one agency observed: "They go wherever the work is, so if you have more work then they will stay with you generally."

A couple of agencies indicated that in exceptional circumstances they were prepared to "reverse market" a high calibre candidate to clients, by actively marketing or selling the skills and worth of a candidate to clients. More generally twelve agencies expressly indicated that they were proactive in the sense that, because of the competitive nature of the industry, they would target or contact regularly companies, that were likely to require labour hire staff in the future. One agency stated that the industry average was about five contacts with a client, before the client would give an order to an agency.

The agencies interviewed indicated that there was some prior interviewing and induction of candidate employees, before their entry on the agency's database or

register. The agencies followed a similar pattern in the vetting of a potential employee. Candidates were asked to sign an application form, a questionnaire on skills and health issues, and a reference check authorisation. They were then interviewed, the length of the interview depending on the position involved, and given some form of safety induction.

The standard procedure for hiring, according to the agencies, was that a client would call an agency and state its requirements for a particular type of worker or workers. The agency then took down a detailed job description for the position or positions, taking into account the client's needs and wants. After that the agency did a prompt search of its database or register to see if it had appropriate staff available to fill the position or positions.

If there were available staff prepared to work under the job conditions, the client was given a resume or general details on the candidate. If the client was agreeable to the candidate or relied on the agency's judgement, then it was just a matter of the candidate turning up at the workplace at the required time. Where a new client was involved a consultant from the agency might introduce the worker.

Three agencies commented on the unrealistic demands of some clients. In this regard one agency made special reference to the fact that it tried to take into account how a candidate was likely to fit into the culture of potential workplaces, so that the person actually had not only the skills to do the job, but was actually going to fit in with the

people in the workplace. Another agency mentioned that, where its labour hire workers were to work in a confidential work environment, it required them to sign confidentiality agreements with clients because of their access to confidential information.

(b) Contractual issues and negotiations

While most contractual terms were found to be of a routine nature, particular terms called for comment where agencies attempted to exclude their liability in respect of the provision of a labour hire worker's services, purportedly on the basis that the client had the daily control and supervision over the worker. This data highlights the issue referred to of the problems that arise, from the sharing of control and responsibility for a labour hire worker between an agency and client.

After arrangements were initiated between client, agency and candidate worker, written or written in part contracts are entered between the agency and client and between the agency and worker. Thirty-two of the thirty-four respondent agencies interviewed specifically indicated that they had a standard agreement or terms and conditions with clients and workers. This was then used as a template from which negotiation regarding terms and conditions took place. Twenty of the thirty-four agencies provided copies of the written agreements that they used.

As to the two agencies that differed from the rest, one stated that it was really a matter of what it negotiated with the other parties, though even here some guidance was obtained from fairly standard terms. The other differing agency declared that it did not

have a standard agreement, but formulated a personalised agreement with each client company. For example the agency indicated that a condition in one of its agreements might require a client "not to provide employees with work unsuitable to their skills or with unsafe work".

Typical terms and conditions that were found in an agency - client agreement were as follows:

- An hourly wage rate based on awards, enterprise bargaining agreement, or negotiated market rates (in 13 agreements)
- Provision for removal of an unsatisfactory worker after a minimum period (often four hours) (in 12 agreements)
- Provision after a certain period (for example three months) whereby a client could keep a worker on a permanent basis, subject to a placement "charge or fee" (in 13 agreements)
- Client to advise or seek approval of the agency for any change of duties or relocation for a worker (in 6 agreements).

A term in seven agencies - client agreements, and one of a special nature, was a term where there was no acceptance by an agency of vicarious liability for a worker in any claim by a client. Vicarious liability is the liability which an employer such as an agency owes to third parties for the negligent or wrongful acts of its employee committed in the course of employment. In this way the agencies attempted to transfer responsibilities and liabilities in respect of the contracted services onto the client. By

way of contrast no agency indicated that it had agreed to the insertion by a client of a "hold harmless clause", whereby an agency agreed to indemnify (compensate for loss) clients in respect of claims against them.

Some representative examples of clauses in agreements excluding vicarious liability of an agency are as follows:

> ... does not accept responsibility for any action brought against the Candidate and does not accept any liability for any losses, damages or expenses caused by the Candidates' actions or omissions in the course of fulfilling assignment obligations.

> Subject to clause ..., we will not be liable to you in respect of any loss or damage however caused whether by our negligence or negligence of a successful candidate whilst in your employ, or one of our employees or otherwise, which may be suffered or incurred, whether directly or indirectly, in respect of the services provided under this agreement.

Four agencies prefaced their disclaimer of liability in clauses in their agreements on the basis that it was appropriate, because an agency was not entitled to and did not seek the day to day supervision, direction or control over the manner of the execution of the services of its employees (which was the responsibility of the client), while they were at the client's workplace. They thus relied on and drew attention to the lack of practical control or control in the field experienced by a labour hire agency, which is characteristic of a labour hire arrangement. On the basis of their rationale the agencies consequently accepted no liability whatsoever for the actions of their employees during their assignment, which caused any loss or damage to the client.

Examples of the particular clauses are as follows:

> The client will be solely responsible for allocating the Contractor's (employee's) work and for supervising the manner in which the work is carried out. Since the company is not entitled to, and does not in practice seek to, exercise supervision, direction or control as to the manner in which the services are executed, the Company is in no way liable for any loss, damage cost or expense incurred by the Contractor or arising otherwise in connection with any act, omission or neglect in executing the service.
>
> The Agency recruit experienced staff and contractors only and adhere to a strict recruitment policy including skills checks and reference checks however the Agency is unable to supervise all employees and contractors on the job sites of our clients and as such the Agency accepts no liability whatsoever for any actions taken by the employee/contractor resulting in any loss or damage to clients' premises or reputation.
>
> The hirer agrees that because the personnel are for the hirer to direct and supervise, then liability to the public, including its products and/or services and consequential loss occasioned by substandard or unworkmanlike performance, will vest with the hirer. Accordingly, the hirer agrees to advise its Public Liability Insurers to extend cover to indemnify the agency and its personnel against claims.

The type of exemption from liability clause referred to would appear to be of mixed value for the agencies that seek them, in that it would bind only the client as a signatory to the agreement, and would not protect the agency from claims by the client's employees and members of the public, who may be affected by the actions of the agency's employees. It would seem that, for an agency to have protection from such latter claims, it would have to require the hiring client to agree to indemnify the agency in respect of claims by members of the public (as happened in the last clause quoted in the preceding paragraph), and in respect of claims by the client's own employees.

Typical conditions in an agency - worker agreement were:

- An hourly wage rate for a casual worker based on an award, enterprise bargaining agreement, Australian workplace agreement or negotiated market rates (13 agreements)
- A minimum period of work for a worker (for example of four hours) (4 agreements)
- Completion of weekly timesheets for authorisation by the client and for payment by the agency (usually electronically) (12 agreements)
- Agreement to observe the policies and standards of the agency and/or client (9 agreements)
- Working hours of the worker (3 agreements)
- A worker to follow the directions and requirements of the client's supervisors (10 agreements)
- Notice (for example one hour) to be given by a worker (11 agreements)
- A confidentiality clause regarding non-disclosure of a client's sensitive information (such as in the financial services area) (9 agreements)
- Worker to advise agency if given duties different to those originally designated (4 agreements)
- No guarantee of ongoing work by an agency to a worker (8 agreements).

In general, agencies were prepared to be flexible and to negotiate with clients on rates and conditions, but some would not reduce their rates beyond a certain limit or "undercut" others just to get work, because they thought that such practices were not economically sustainable in the long term. Twelve agencies however indicated that they offered credit to clients on certain conditions (for example thirty day credit). Two

of those agencies however stated that the provision of credit was standard practice in the industry. One of the agencies wished that it could get clients to pay up front, to avoid the risk of payment default by a client.

While there was usually little negotiation with workers, some agencies were prepared to push for a higher rate for a worker, where the worker was performing specialist tasks, or different or higher duties to those originally agreed upon, such as where a person was initially hired as a labourer, and then asked to perform plant operating duties. There was also an appreciation that where high skills were in demand notice had to be taken of market rates. In these situations the agency would approach the client to renegotiate the rate. Further agencies indicated that they were prepared to pay "site rates" to their labour hire workers, by abiding by whatever industrial instrument (award or enterprise bargaining agreement) was in place for permanent employees at the workplace of the client or host employer.

Ten agencies indicated that they would not supply a worker, where they thought that the terms and conditions were unreasonable or unsafe. They insisted on conditions permitting their inspection of client premises in order to protect the safety of workers sent there. Where this was not acceded to, a worker would not be sent to the premises. This approach to workplace safety is an illustration of how an agency can deal with the problems associated with an agency's lack of practical control of its worker at a workplace. According to one agency "it comes down to how you manage your workforce and how you manage your client relationships".

There was a consensus among the agencies that overall clients were cost conscious, and that clients wanted service at the best price they could get it. But it was noted at times that cost was not always a final determining factor, in that a client may also be concerned about the agency's process of recruitment, its after hours service, and the experience and skills of the consultants in the agency.

In negotiating with clients, agencies saw and promoted themselves as the intermediary between the client and the labour hire worker, who insulated the client from issues such as unfair dismissal claims, which could otherwise affect the client. In that role an agency is not only the recruiter and paymaster of the hired out workers, but is also responsible for the payroll tax, workers' compensation levies, and any public liability insurance coverage in respect of those workers. In return an agency retains a margin or mark up for itself.

In general most agencies did not mention their margin or mark up rate. One agency referred to its rates as confidential. One agency remarked that the margin of an agency is "generally 5 or probably 10%". Another agency stated that "our margins in this industry are anything in the temp market from 10% to 20% gross profit margin". In another situation the margin of the agency was expressed as "generally 5 or probably 10%". One agency referred to the rate in monetary terms – "We then add a service fee on top of that, from 65 cents to $2.50 per hour depending on the type of person". There was also mention by an agency that it charged special rates for clients, from whom it received substantial custom.

One operator of an agency summed up the service in the following terms: "What we sell is simplicity. We will say, you pay us $18 an hour and we will pay the people $15, and we'll look after all the details, and this is how you pay us, you pay us once a fortnight, once a week".

As to situations where a labour hire worker was taken on by a client as a member of the client's staff, one agency pointed to an industry practice that an agency would charge a transfer fee, where the change over occurred within the first three months of working with the client. Whether a fee was charged depended on the particular agency. The levying of a fee was more likely with clerical and executive positions than with industrial positions. Another agency disclosed that it had the option of charging a "$1,000 referral" fee, where a client directly engaged a labour hire worker in the first six month period, without notice to the agency.

6.4.3 Nature of disputes between agencies and clients

The following data draws attention to the issue of the problems that arise from the sharing of control and responsibility in labour hire, between an agency and client for a worker.

While the respondent agencies admitted encountering disputes in labour hire relationships, twenty-seven of the thirty-four respondent agencies expressly claimed that disputes did not happen often. It appeared to be the norm for disputes to be

recorded on computer and on a paper file. One agency by way of exception stated that it did not record disputes, "because they're either fixed or they're not".

Twenty agencies generally indicated that disputes were avoided in a proactive way by the use of preliminary screening processes and through the use of their consultants who were trained to avoid disputes. Mention was made too that as the "middle man" or intermediary it was the role of the agency to resolve problems that may arise.

Types of disputes between agencies and clients

The types of disputes between a labour hire agency and its clients, said by some agencies to be caused by a lack of communication or misunderstanding between the parties, can be classified under various heads and these heads are set out below.

(a) Competency and suitability of the worker

These types of disputes were mentioned as occurring by twenty-five agencies, and were thought in particular to be caused by lack of communication and misunderstanding between an agency and client company. The disputes were thought to be preventable by the agencies through the use of quality checks, ongoing monitoring by an agency and proper supervision of the worker by the client. The processes said by the agencies to be used to resolve the situations included mediation, more supervision, efforts to lift the performance of the worker, or in the final resort, movement of the worker to another job.

As regards the reasons for disputes in this area, it appears from the agency responses that in the first instance no party may be really at fault in that arrangements may not be working as they were foreseen to work (for example unexpected personality clashes between worker and management), or where the parties were genuinely mistaken as to the other's expectations, such as where the client and worker have oversold each other, which then resulted in disappointment for the parties. It has been for example the case that a candidate was not the match for a position, because of misunderstanding over the skills level or work standards of the candidate, or because it turned out that the candidate did not have the appearance or image required (such as for retail clients). It was pointed out by two agencies too that it was no-one's particular fault, where in exigency situations the shortness of notice given by a client for workers may have resulted in a hasty screening process by an agency of candidates.

In some circumstances the agencies pointed out that the fault for the disputes lie with the workers. This occurred where the workers had personal problems, were not punctual, did not work to a reasonable standard, or were not the type of employees or willing employees that they said they were to the agency. Fifteen agencies were also of the view that disputes about the competency and fit of a worker were problems arising from a client's behaviour. In some instances the agency view was that client expectations were unrealistic. It was mentioned that could arise where a client did not specify exactly the selection criteria required for a position. Problems also arose where the job on the site was not what the client had indicated initially.

It was pointed out too by agencies, that disputes arose as a result of a lack of proper supervision and monitoring of a hired worker by the client. In such a situation where for example the client was too busy to give the worker proper instruction and information, the worker became lost and found it difficult to perform the allotted tasks.

Even where the client was at fault, it appeared to be likely that the client won out, because three agencies stated that they took the approach that the reality of the situation was that the client was favoured to the detriment of the worker, because it was the client paying the money to the agency. The consequence was that generally, if an agency said that they were not happy with a worker, then that worker would be removed or replaced by the agency. In some situations the agency was prepared to renegotiate with the client. One of the attractions of labour hire was that a client could exercise this option or flexibility to discontinue a worker's services.

One agency conceded that from time to time the problem may lie with the agency, where there has not been sufficient screening of a candidate or insufficient attention to the client's requirements. Diligent agencies pointed out that it did not happen too often for them. The more conscientious agencies indicated that they were proactive, and carried out fairly regular quality checks on the performance and timeliness of the staff that they sent out. In this way they tried to prevent situations developing into disputes.

(b) Wage and fee disputes between an agency and a client

Disagreements over wage and fee matters and incidental matters (such as the general responsiveness of an agency to a client's demands) between agencies and clients

emerged as an issue in the interviews of fifteen agencies. The disagreements centred on matters such as the correct wage rates, punctual payment by clients, the transfer fees for the permanent placement of workers within a client organisation, and the general responsiveness of an agency to a client's needs. Generally agencies were prepared to negotiate with their clients or customers on money matters, and extend credit and payment times.

Agencies indicated that from time to time disputes arose as to the proper charge rates to be paid by a client. Where through error a higher charge rate was imposed on a client then was warranted, because a worker had been wrongly classified by an agency, it seemed that, depending on an assessment of the value and worth of the client and its future potential, an agency might leave the pay rate for the worker where it was, or cut its own margin and bring down the charge rate to the client to where it should be. Where faulty work occurred, in that a worker had not carried out a task properly (such as where a chef had burnt and not properly cooked food), agencies made monetary adjustments or arranged for rectification work. Where an agency was faced with claims by its clients that competitor agencies were charging cheaper rates, the agency explained to its clients that it was because the other agencies were attempting to pay their workers under cheaper but inappropriate awards (for example under a plastics and rubber award rather than under a federal metal and engineering award).

One cause for disagreement that arose according to two agencies was the issue of transfer fees or release payments by a client, where it took a hired worker onto its own

staff. It appears that, in particular, the longer the hire engagement the more likely a client resented making this payment. The reasoning for this according to the agencies was that the client felt that the agency had been making a profit out of the worker for some period. In some instances the client as host employer had employed the worker directly without notice to the agency.

One problem area for agencies was that of bad debts where a client company became insolvent. The problem for an agency here is that it is responsible for the payment of workers' wages, but may not be able to get payment for the wages from the client company. One agency stated that when its client went into liquidation "we still had a week's pay we had to give those people, $33,000 pay I remember. You've always got bad debts, and over a period of time you have to save up enough to cover yourself". Four agencies disclosed that they conducted credit reference checks on prospective clients.

(c) Termination of a worker's services

This issue for an agency as legal employer can be a problem with potential industrial relations implications. Five agencies referred to difficulties in this area. Termination here refers to the termination or ending of the particular labour hire assignment or services of an employee. It is generally specified in the terms of the client/agency agreement (or understood by the parties) that a client may end a labour hire worker's services at its discretion, subject to any special agreement.

The agencies agreed that overall they were governed by and subject to the client's requirements and assessment of an agency worker. They indicated that it was emphasised to a worker that continuity of employment was entirely subject to the client's requirements, with the consequence that employment could be terminated with minimal notice, which is given formally by the agency. One result of the discretionary power of a client was, as instanced by one agency, that a client could request the removal of a worker seeking higher wages.

However there was some concern among the agencies involved that the client should not act peremptorily and without proper or sufficient notice, and that there should be in place a process of warning and counselling for a worker, especially for a worker who has been working apparently satisfactorily for some time at the client's workplace. One agency put it directly that ongoing labour hire workers should not have their services terminated for a relatively minor transgression such as occasional lateness without any prior discussion between agency and client, and that in respect of such workers "the client needs to understand that irrespective of the fact they are casual, you need to afford them fair and equitable practices in terms of your moral obligation as an employer".

Apart from having any moral obligation as employers, the agencies were mindful that any termination of a worker's services should not result in an unfair or wrongful dismissal at law. They recognised that they were vulnerable here, given that termination of a worker's employment was at the initiative of the client. Fortunately for

agencies generally, a labour hire worker could bring dismissal proceedings as a casual worker at law only in special circumstances (for example twelve months service).

(d) Division of responsibility between an agency and client

Fifteen agencies referred to these types of disputes as an issue of concern for them. This issue in particular brought out underlying tensions in the labour hire relationship between an agency and its client.

Because of the tripartite nature of the labour hire relationship, de facto control and supervision of the worker in practice have to be shared between an agency and a client. This can lead to problems over responsibility for the worker's safety, and for liability for the actions of the worker with respect to other persons (vicarious liability).[1]

It was felt by the agencies that lack of control over a worker, whereby for example a worker was put into a different position by a client unbeknown to the agency, or the lack of proper supervision of a worker by a client, had the potential to create legal liability in one or both parties. In this regard one agency owner mentioned the difficulty of obtaining public liability insurance in Australia to cover his workers.

There was a concern expressed by the agencies that an agency could be held culpable for injury or damage, despite the fact that an agency did not have control over the performance of its worker on a work site and that management of the worker and workplace conditions rested with the client organisation.

[1] Occupational health and safety issues will be dealt with in greater detail under its own heading.

Agencies indicated that they sought to reduce the prospects of liability by systematic monitoring of work sites, and by the inclusion of clauses in agreements with the clients stipulating that the clients were to provide clear job or task instructions, and to provide direct supervision while duties were being performed.

Some sample clauses were as follows:

> To provide clear job/task instructions to – field staff regarding the task/s undertaken, and to provide direct supervision whilst those duties are being performed.

> From the date of commencement the client is responsible for the proper and adequate supervision of the Temporary Employee to enable the Temporary Employee to carry out his or her duties. The Client must provide a safe working environment relating to the health, safety and welfare of the Temporary Employee and comply at all times with all common law and applicable legislation relating to employees including without limitation, legislation dealing with occupational health and safety and anti-discrimination. The client undertakes to ensure that Temporary Employees only perform work for which they are appropriately qualified or certified.

It was considered that one way that the employer-employee relationship could be maintained was through constant visiting (weekly or otherwise), of the work sites by agency representatives. It was pointed out by some agencies that it was impractical for an agency properly to monitor work sites, where they numbered in the hundreds or were widely spread geographically.

There was concern by five agencies about public liability, where damage or injury was caused to a third party by an agency worker. In this regard views were expressed that too much responsibility lay with an agency, and that the liability should be shared more

equally by the client. Some agencies such as a security firm pointed to the difficulties of obtaining insurance cover against public liability, which was necessary to protect against claims that might range from assaults to damage to technology by a computer programmer.

Two agencies indicated that their lack of practical control over workers led to difficulties and clashes with clients, where clients changed the role of a worker without notifying the agency. It was noted that this has led to an agency such as the Drake agency as employer in New South Wales being held liable under workplace health and safety legislation, notwithstanding that the employee injured had been moved from one job to another without the agency's knowledge. There was concern that agencies could be open to liability in this way under workplace safety and workcover legislation, when there could not be total monitoring of a worker's role and reliance had to be placed on receiving the required notice from the client.

6.4.4 Nature of disputes between an agency and a worker

The interviews with the agencies revealed that these types of disputes usually related to work conditions and wages and allowances. Five agencies mentioned that work conditions had led to disputes; eight agencies referred to wages and allowances causing disputes; and three agencies indicated that unreliability by a worker had created disharmony between an agency and worker. One agency was of the view that the younger generation (referred to as the "Generation X") were more aware of, and more willing to enforce their rights at the workplace.

The general impression from the agencies that commented was that, where there were complaints about work conditions, the agencies tried to address the complaints, and their reaction depended on the nature of the complaint. For instance, where the complaint was that conditions were unsafe, one agency stated that it would try to negotiate rectification of the problem with the client. If it could not do that then it would simply refuse to trade with the client. Where a worker complained of workplace harassment, a response was to talk to a senior officer in the organisation in an attempt to work through the problem. Agencies did this as part of their duty to their workers, as well as their clients.

A few agencies disclosed that they took a hard line approach to workers' complaints, and showed little interest in that regard. The view was that, if the agencies catered too much to workers, they would demand more and more of an agency's time and involvement, with insufficient attention being paid to how much it was costing the agency.

With respect to wage and allowances disputes between an agency and a worker, the main area for dispute was whether the proper wage rate or allowances had been paid to a worker. A typical scenario adverted to by nine agencies was where an individual was doing a certain task, and believed that payment for this should be at a higher level, whether by virtue of an award, collective agreement or market rates. It was pointed out that in one situation the client had told the agency that the worker was carrying out certain level work at an airport, and it turned out that the work was significantly higher

level work. In another situation allowances for travel and living from home allowances for a worker were not calculated properly.

There was agreement by nine agencies that an employee should be looked after and paid properly to maintain employee morale. Further there was agency awareness that short or under payment could lead to problems and claims at law for back payment later on. One agency mentioned that in one case an employee without any prior notice to the agency had taken out a claim against the agency in an industrial commission for non payments of a meal allowance of $7.50. As an attempt to guard against legal claims, it was provided in one agency agreement with a worker that there was to be prior reference to a peak labour hire body for arbitration over disputed pay rates.

6.4.5 Whether occupational health and safety issues arise in labour hire

The data in the following sections on OHS draws attention to the issue of the sharing of responsibility for labour hire workers between a labour hire agency and client, in this case in respect of workplace health and safety. It also draws attention to the issue of organisations seeking to avoid regulatory responsibilities placed on them as employers.

Seventeen of the thirty-four respondent agencies identified the occupational health and safety (OHS) issue as a somewhat common or major issue.

As discussed in a prior chapter, OHS is the maintenance of health and safety at a workplace. OHS law is the Federal and State legislation in Australia, which follows a similar approach to the regulation of workplace health and safety. This approach

involves the use of general duty provisions, which impose responsibility on parties including employers and occupiers of workplaces, to prevent injury and disease to workers and other persons at a workplace. Breach of this duty is a criminal offence, and can also lead to the issue of improvement and prohibition notices to an offending party.

The OHS concern from a labour hire viewpoint is the maintaining of the health and safety of the labour hire worker and others at the workplace, where the labour hire work is sent. This is complicated by the fact that de facto control of a labour hire worker is split between the labour hire agency and the client company, and by the reticence of a labour hire agency to interfere with the day to day running or operation of a client's business, which necessarily entails the day to day supervision of a labour hire worker carrying out duties there.

Under the *Workplace Health and Safety Act (Qld)* both a labour hire agency as employer and a client as the operator of work premises have statutory obligations and responsibilities to maintain workplace health and safety. Under Section 6 (2)(d) of the Industrial Relations Act labour hire agencies are included in the definition of "employer".

Difficulties apparently can arise when a labour hire worker is shifted to a new location or job, without notice being given to the labour hire agency. The agency is then unaware of any potential dangers in the new location, and may be held liable for any injury to the worker, regardless of its lack of knowledge.

The interviews of all agencies reveal that prevention of OHS incidents is attempted through:

- Contractual demands on a client to give notice to an agency of any change duties or relocation for a labour hire worker (15 agencies)
- Training and safety inductions for the worker by the agency and the client, and not sending workers to potentially dangerous sites (21 agencies)
- Periodic monitoring or site inspections by an agency (25 agencies)
- Requesting a worker to advise of changed duties or work hazards (9 agencies)
- Regular contact and liaising with the clients by an agency (8 agencies)
- The ultimate withdrawal of services from a client (10 agencies)

Some agencies stressed however, that for geographical and other factors, in some situations it was just not feasible or practical to conduct site inspections of work premises. In such cases agencies relied on the worker to give notice of unsafe work facilities or practices. It could perhaps be argued here whether such a situation is satisfactory.

Under the Queensland occupational health and safety legislation, the *Workplace Health and Safety Act 1995 (Qld)*, the client as owner or operator of a workplace, as well as the agency as employer, is under an obligation to safeguard the well being of persons on the work premises. A problem can arise however where there is an attempt by either party to shift responsibility for OHS matters onto the other party, either in practice or through contractual exclusion clauses (such as those excluding an agency from vicarious liability for the actions of its workers that injure others at the workplace).

Some agencies perceived that too great an onus was placed on a labour hire agency as employer, and considered that a greater obligation should be placed on the client as the operator of the work premises, or even on the person who was the worker. Agencies however were cognisant of the fact that as employers they could keep workers' compensation premiums down and stay in business, through the prevention of work injuries to their labour hire workers.

For certain agencies involved with construction work workplace health and safety was an important issue, because it was considered by five agencies that there was the potential for many accidents in that area (unlike the white collar area). There was concern that too many Workcover claims from their workers could impact on the level of workers' compensation premiums paid and on their Workcover rating as an employer. One agency put it that, if an agency did not do site inspections correctly to see that workers were using the proper tools and wearing protective gear, and did not notify the client where there were issues to be fixed, these matters would come back to adversely affect or "bite" them. One large agency stated that it had a national workplace health and safety co-ordinator employed just to look after health and safety issues in its five capital city branches.

A recurring comment from the agencies concerned the lack of control that agencies had over the fate of their workers at clients' workplaces. Agencies pointed out that they were putting a person on a site that was not under their direct supervision, and that, in some circumstances, this could be a very dangerous situation, because they were not

there on site looking after the employees' interests, such as for example ensuring that there were no slippery floors or boxes in walkways.

Six agencies indicated that in such a situation they could not know with absolute certainty what their people were doing, and it may be that unbeknown to them an engineer or architect has been sent to a dangerous construction site. A protection adopted by fifteen agencies was a contractual requirement that a client notify an agency of any change to the agreed duties. Two agencies remarked that this notice was often overlooked. Other means of protection adopted by agencies included induction and training to be provided by agency and client; regular audits of workplaces by agencies; and reliance on notification by workers, especially where a site was faraway.

Twenty-six agencies revealed that a standard feature of their operation was the giving of preliminary induction and training to workers, which included instruction on health and safety issues. These agencies appeared to believe that the workers would abide by the instruction. Some agencies took a view that workers paid little attention to this instruction, because it had become a monotonous procedure. In addition to their own training nine agencies insisted that the client organisations gave site specific health and safety instruction.

The seventeen agencies who thought of OHS as a major issue indicated that they placed importance on site audits or inspections, both before and after placement of their employees. Fifteen agencies mentioned that before they sent employees to a site, they would evaluate and would do a risk assessment of the safety level of the client's

workplace and check for potential hazards, to gauge if it were worthwhile putting an employee on the site. If it were assessed that the site and jobs were unsafe (for example if the scaffolding were unsafe), they would not do business with the organisation, unless the dangers were fixed up. One agency placed great importance on only sending its employees to safe worksites. The agency confided that it just recently had to deal with an accident at a worksite, where an employee had lost the top of his finger.

As well as the preliminary site audits to ascertain whether there were any risk factors, eighteen agencies concerned indicated that they conducted ongoing safety audits of workplaces. Sixteen agencies had a full time officer whose job it was to inspect worksites. By having regular audits the agencies hoped to spot any potential hazards or situations (which may involve the client getting the agency's employees to do things that they were not supposed to be doing) and to raise them with the client organisation.

Even with the safety audits however, the special nature of a labour hire arrangement brought up a dilemma for a labour hire agency. An agency in practice had to tread a fine line between insisting on the maintenance of proper safety standards at a client's work site, and not telling a client how to carry out its operations. As one agency put it: "However, we can't tell people how to run their own organisation". A contrary view to this approach would be that an agency should insist on proper standards being kept.

Where agencies thought it was impractical for them to conduct safety inspections or audits because of geographical limitations, an agency would rely on the employee to

raise concerns about safety issues. One agency disclosed that, in the case of a worker sent to Mt Isa in Queensland, it would supply a camera to a worker sent there, so that the worker could take photographs of the work site. The work conditions would then be discussed with the worker, in light of the photographs.

A similar procedure was adopted by the agency in respect of employees sent outside the country. Where there were geographical and other practical constraints on agency inspections, agencies endeavoured to cover themselves from liability, by requiring in their upfront documentation with employees, that the employees be very conscious of safety, and to contact the agencies should they see anything that they considered to be unsafe.

There was a suspicion among agencies in the group that some clients attempted to avoid or transfer their OHS responsibilities, firstly in their use of labour hire staff (say for manual handling) so as to avoid safety obligations for the use of normal staff, and secondly in their approach to labour hire employees. In this regard one agency remarked: "Some companies do use labour hire to offset their OHS responsibility. There is no doubt about that at all".

Under the *Workplace Health and Safety Act 1995 (Qld)* both the agency and client body have a statutory obligation and responsibility to maintain workplace health and safety. There was a perception however that clients "passed the buck" or took advantage of the general vagueness as to responsibility in a particular situation, for example

responsibility for training. One agency noted that "It is difficult when you have two employers".

Agencies felt that they had more to lose in the case of work accidents, because, as well as the potential for prosecution under the workplace safety legislation, their Workcover or workers' compensation rating could suffer as a result of the accidents. Accordingly twenty-three agencies indicated that they pointed out to clients that the clients had a responsibility under the workplace safety obligation, in addition to a moral obligation, either through formal documentation(16 agencies) and/or informal means such as telephone or discussion (14 agencies).

The foregoing concerns expressed by agencies, as to the problems surrounding the implementation of OHS requirements, are supported by a recent study by Johnstone and Quinlan (2006: 273-289) on the problems in Australia of enforcing the general OHS standards in the labour hire (also known as leased labour) sector.

Johnstone and Quinlan pointed to the scope for confusion and blame shifting between agencies and clients, for matters such as induction and training, and hazard identification and risk assessment. They also referred to evidence which pointed to the practical and logistical problems for labour hire operators (especially the numerous small operators lacking overall resources), in attempting to carry out OHS obligations, essentially designed for the standard employment situation. These included the practical difficulties of performing preliminary safety checks on clients' workplaces.

There were also major logistical challenges for agencies in providing workers of diverse occupations for many different workplaces, while at the same time trying to ensure adequate risk assessment, induction, training and supervision. These difficulties were exacerbated where labour hire workers were placed into "environments of elevated OHS risk", when used as a short term solution to organisational upheavals in companies. A further bar to OHS regulation of labour hire work was the reluctance of labour hire workers to raise OHS issues with the "host employer" (the client), given that the "host employer" could terminate their temporary employment without reason.

The remaining respondent agencies (seventeen out of thirty-four) did not treat OHS as a major issue on the basis that:

- People in general are becoming more conscious of workplace health and safety (2 agencies)
- Agencies felt limited or felt resigned as to what they could do (6 agencies)
- There was a limited OHS risk in an office or clerical setting (4 agencies)
- Any potential dangers were of a more minor nature (for example, dirty or unhygienic work premises) (one agency)
- Agencies relied mainly on their agreement with their clients, inter alia requiring clients to sign off on a general duty of care clause (4 agencies)
- Agencies had what they thought was a good risk management process in place (11 agencies)
- The agencies worked only with reputable and reliable clients (5 agencies), or
- The agencies did not rely on clients to do any training of workers (4 agencies).

In a setting where the agency acts as an intermediary between the worker and client company about the general safety concerns of a worker, one agency felt it was taking on a "union type" role, whereby a worker made complaints in confidence to the agency about general safety matters, and the agency arranged to have them fixed. In this way the agency felt that it was "stealing the thunder" from the unions, and derogating from their standing.

The same agency thought that too many safety inductions were counterproductive, in that in its view workers became blasé about them or caused workers to take less responsibility for their actions. This agency also queried the rationale behind OHS and workers' compensation regulations and considered that liability should rest with the person or persons who are responsible for the worksite.

Agencies in the second group, while not treating OHS as a leading concern, were still quite aware of the benefits of reducing workers compensation costs, through a low accident record. With respect to reducing costs, surprise was expressed by an agency that any labour hire operator would want business to such an extent, that it would agree (in a "hold harmless" clause) to indemnifying a client against inter alia claims for injury.

The agencies in the second group expressed a range of reasons why workplace health and safety was not a major reason for them. In some cases it was because agencies dealt largely or solely with providing clerical workers. In other cases agencies felt that it was

not a problem due to their conscientiousness. Another factor raised was endeavouring to deal with only reputable clients.

As regards clerical work, the view was expressed by agencies dealing with clerical issues, that unlike the industrial scene OHS was not a significant issue. This was due to the nature of the work, in that workers were not using potentially dangerous machinery or performing potentially dangerous duties, but were performing office duties and using only items such as printers and fax machines.

On the issue of conscientiousness, agencies in the second group thought that an overall approach or risk management obviated the likelihood of accidents. This approach involved workplace inspections before placement of staff to ensure people would be working in a safe environment; general safety and site specific inductions; regular contact with the worker and client; and dealing with reputable clients.

One agency went so far as to say that all accidents were preventable, and one way of achieving that was not to place anyone with a client who took chances on safety. Another agency had in place a risk management strategy, which could be shown to government authorities as proof it had taken all reasonable steps. This involved getting worker and client to sign forms requiring the taking of precautions (such as wearing protective clothing) and identifying risks. The view was expressed that in maintaining regular contact to make sure everything was working well or satisfactorily, an agency was providing a union type role in that the workers could speak in confidence with an

agency to have safety problems rectified, especially where to the surprise of agencies, workers saw the clients as their employers.

Agencies placed importance on dealing with reputable clients, who were conscious of the fact that they were still responsible for the health and safety of people on site. In their view reputable clients accepted their duty of care under OHS legislation to provide a safe workplace and safe work system, and to provide adequate supervision, induction and training. They also would be unlikely to relocate workers to new jobs without notice to an agency. It was thought in any event that it was in the best interests of the clients to take care of hire workers, so as to get the best return on the hourly rate paid on them.

Similarly it was felt by agencies that it was very much in their interest to maintain high safety standards. One agency pointed out that one of the best ways of remaining competitive in the market place was to keep its safety costs under control. In the view of the agency, workers' compensation costs should be kept low, because it affected the rates charged to clients. Attention was drawn to the fact that Workcover in Queensland had an industry rate for workers' compensation insurance premiums, and a higher levy was charged if a company's rating was worse than the industry average.

Some agencies went to special lengths to maintain high standards. One agency operated a company not only to provide ongoing safety guidance to the agency, but also to educate clients as to risks in their workplaces and how to overcome them (for example

by demonstrating proper forklift operation). Another maintained a special work injury management team in Queensland, to look after injuries and OHS policies and procedures.

Despite discounting workplace health and safety as a major problem for themselves, some agencies had a somewhat resigned attitude towards workplace accidents given their lack of practical control over a worker on a work site under a labour hire arrangement. One agency made the point that it could inspect a manufacturing site on one day and see that everything was fine, and then send a worker there the following day, when there could be a hazard that was not there the day before.

One agency operator with strong views felt that an agency was limited as to what it could do as the employer of the worker, "because we have no control over safety on a site, so it is all a nonsense". He went on to say that: "the workplace health and safety legislation is a just a total shambles, whoever wrote it has never heard of labour hire". In this regard he drew attention to the Drake agency case in New South Wales, (which will be discussed in a following chapter), where the agency supplied a person to a factory, and the person was moved from one machine to another, without the agency's knowledge. The agency operator particularly was aggrieved that the Drake agency ended up being fined under OHS legislation, in respect of an injury to the worker.

The same agency operator made an interesting observation, that the divided OHS responsibilities under legislation between a labour hire agency and client caused problems and confusion. In his view these responsibilities had to be on one or the other,

not both. He considered that the easiest way would be to say they were site responsibilities, and that the same situation should apply also for payroll tax and Workcover responsibilities.

6.4.6 Opinion of a peak business body on occupational health and safety and labour hire

One peak recruiting body on the issue of workplace health and safety advanced the view that, having both the labour hire agency and client company sharing workplace health and safety obligations, rather than leading to a diffusion of responsibility, would lead to better safety outcomes, because there would be more parties looking at the issue of workplace health and safety.

A spokesman for the group was of the opinion that in the future an on-hired or labour hire employee would be likely to be in a safer situation than a normal employee in a non-labour hire location, because there were parties (the agency and client) working together to ensure workplace health and safety. In his view having two heads rather than one on the matter was a far more efficient way of dealing with the issue, in that there were two parties who could work in conjunction to facilitate the ongoing review and assessment of a workplace to identify risks and hazards, and to come up with new ideas on promoting safety. He considered that this utilisation of resources was a better situation than the one where the parties were inclined to leave it to the other to take action. In this regard the spokesman commented that one of the problems at the

moment was that there was a lack of consistency, in the interpretation of who was responsible in a certain situation.

According to the spokesman the end result of the two parties working together would be a safer workplace not only for the on-hire or labour hire workforce placed there, but also for the permanent workforce there, because there are more skilled managers, in-house and outside, looking at OHS. A consequence would be that the use of labour hire at a workplace would make it more safe than normally. The contrary view to this position would be that having two entities responsible for OHS means a lack of application by the entities, in that each is expecting the other to comply.

6.4.7 Opinions of unions on the impact of labour hire on occupational health and safety

All but one of the twelve unions interviewed considered OHS to be a major issue with respect to the use of labour hire. One union noted in passing that OHS has always been a contentious area between employers and employees anyway.

Eight out of the twelve unions thought that the use of labour hire posed real safety problems, in that proper training or lack of training for labour hire workers was often an issue. One union referred to the 'break in the safety link', where other staff have to work with labour hire workers who are lacking the proper work skills. This was due in part to labour hire workers often having to keep adjusting to changing workplaces and workplace conditions.

A widespread attitude was that the mere nature of labour hire posed special problems as regards workplace health and safety. It was considered that responsibility for the training of labour hire workers for the job shifted in practice between the agency and client, and was a matter for concern. While both parties had a joint obligation under the workplace safety legislation, their efforts were considered inadequate in different situations.

As regards the agencies, views were expressed that, apart from the few agencies that were proactive, agencies commonly would spend the least possible time on safety training for their employees. This attitude was governed by cost factors, namely that time spent on training was likely to eat into profit margins. It was felt that some agencies were lax on safety, and were prepared to take a risk on the chance of injury. According to the unions one result was that the cost cutting measures of the less ethical agencies make it difficult for the ethical ones.

There was a similar negative attitude towards safety training by the clients. There was a feeling expressed that every client organisation was different in the way that it managed workplace health and safety. Further there was a widespread view that, though they shared a joint obligation with an agency, clients or host employers seemed to shirk the responsibility for training hire workers on how to carry out duties safely. While some of the smaller ones may have lacked the proper infrastructure, it was felt that clients were unwilling to provide the same training or resources for casuals such as labour hire staff, as they would for their permanent staff. As one union put it: "I don't think there

would be the commitment to address OHS issues, if people are only going to be there for a couple of weeks".

In addition to uncertain training, it was pointed out that the special nature of labour hire was likely to cause a negative impact on OHS, because of the irregular work hours and changing workplaces for labour hire workers. A result was that an employee might not be familiar with the surroundings, particularly where little or no attention had been paid to proper inductions.

Six of the twelve unions believed that labour hire had a detrimental effect on OHS, in that a sharing of workplace safety responsibility between agency and client might not happen in practice, because of shirking of responsibilities by either or both parties to save time and costs. It was thought that this could arise in part because the agency did not exercise day to day control over its employees, and there was thus a "fractured chain of command". One union put it "as sending someone in that is your employee to work under someone else".

One union was particularly vehement about the possibility of the presence of a new labour hire person on a worksite breaking the link or chain of the safety procedures at that workplace. The union secretary thought that it could be particularly dangerous where dangerous goods were involved. It might be that a labour hire person was with others working with dangerous goods, but did not know how to deal properly with the dangerous goods.

Another union considered that the injury risk at a workplace was considerably greater when agency workers were involved. According to this union whether this increased risk manifested itself into actual incidents was something on which it did not have information. There were suggestions from some of the unions that there should be suitable regulation put in place; that unions could work with agencies to ensure that workplace health and safety is more regulated; and that there should be better inspection of workplaces by government officers.

One union considered that the current workplace health and safety legislation in Queensland, the *Workplace Health and Safety Act 1995 (Qld)*, was very much about self-regulation, and was not conducive to labour hire in that it relied on "infrastructure, consistency and people building up knowledge at a workplace". The system under the legislation also relied on elected workplace safety representatives who were properly trained, and on committees that met regularly at the workplace. In the view of this union, labour hire was not conducive to any of those things. The union also highlighted the difficulties associated with the transitory nature of labour hire, in that a labour hire person might come in on a Monday, be involved in an accident and be gone the next day.

Unions in the latter group of six unions relevantly commented that labour hire workers because of their precarious work status (and possible lack of awareness of their rights) were less likely to complain about unsafe workplace practices and were more likely to feel compelled to work longer and more irregular hours. Labour hire workers were less

likely to complain because many would think that their job posting was for a short term, and so were more prepared to put up with shoddy equipment such as a desk or chair. There was also a common view that the workers were worried about complaining about the work environment, because of the fear it might cause a negative reaction from the client.

One union instanced a situation where a labour hire member had complained to the client or site operator about chemical smoke and the client had then instructed the agency not to send the person back to the site. The union in question considered that the impact of labour hire on commercial health and safety was the same as that of casualisation, and that people with tenuous employment relationships were less likely to complain abut unfair or dodgy work practices.

The reticence of workers to complain also caused flow on effects with regard to safety. If there is likely to be compulsion on individual workers to work extended hours (for example starting earlier and working through normal breaks), to achieve work targets, then such working hours could impact on their concentration and work ability, which in turn could increase the chances of accidents.

6.4.8 The views of labour hire workers on the relationship between labour hire and workplace health and safety

Three labour hire workers expressed some comments on the use of labour hire and workplace health and safety. Two of the workers (who worked in an industrial area) expressed concerns that labour hire did have a detrimental effect on workplace health

and safety because of cost cutting measures in labour hire, and lack of proper training. The other worker, who was a female in a white collar area, did not express similar concerns and referred to the regular occurrence of OHS training in her jobs.

The two industrial workers interviewed expressed cynicism generally about the attitude of both labour hire agencies and client bodies towards workplace safety. They felt that the use of labour hire was having a detrimental effect on workplace safety. Both tended to the view that agencies were after maximum profit, and usually were reluctant to provide more than basic or token work and safety training, whether by video or otherwise. The workers felt that agencies were inclined to leave safety training or induction to the client or host company, on the assumption it was the host company's business to provide training to ensure that the worker knew how to do the job.

Both industrial workers felt that, where a vigilant labour hire worker complained that workplace safety was lacking on a site, the worker would be likely to be pressured to "quieten down" or lose future work. The result was that labour hire workers were reluctant to say that something was wrong or did not happen as regards workplace safety issues, such as noise levels.

By way of contrast the female white collar worker had fairly positive views about the general and safety training provided to her. She recounted that with respect to a data entry placement with a bank, she had received fairly extensive training including safety

training. With respect to another position the same person felt that if anything she had received disproportionately long training, given the short duration of the job placement. However, the two industrial workers did highlight the serious consequences of having inadequately trained labour hire employees working at a client's premises, where potentially dangerous activities are carried on. In particular one such worker instanced a dramatic incident involving himself, which exemplified the dangers that could arise when an improperly trained labour hire worker was brought in to work with others on a site.

The industrial worker referred to a situation where he had been working at a foundry in a pouring team, where there had been a continual turnover of staff, with some staying only a matter of days. In addition it was very fast paced work with up to four furnaces operating at any given time. One short term worker, who had received no induction from the labour hire or client company, on one occasion put power to the wrong furnace, with the consequence that the industrial worker suffered severe burns from exploding molten metal. What was particularly galling to the injured worker was that a week later the offending worker had left the worksite never to be seen again, without even leaving an apology. To the injured worker this "revolving door" turnover of staff was not conducive to workplace safety.

6.4.9 Whether anti-discrimination issues arise in labour hire

The data below focuses attention on a key underlying theme of this thesis, that employer organisations have incentives to utilise less regulated or unregulated labour markets

such as labour hire, to avoid regulatory responsibilities placed on employers, such as the anti-discrimination legislative obligations on employers.

The issue here is whether labour hire workers are discriminated against either in the selection processes for jobs, or while they are working at workplaces, on the basis of race, gender, sexual preferences, marital status, age or other reason.

In Queensland the relevant legislation applying is the *Anti-Discrimination Act 1991 (Qld)* and Federal legislation such as the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)*. Under these Acts discrimination (and sexual harassment) in employment and other contexts is prohibited on the basis of criteria such as race and gender.

Agencies revealed in the interview process situations ranging from direct discrimination to somewhat subtle attempts at discrimination. A few of the agencies were of the opinion that the labour hire method of employment was used deliberately by companies to get around the anti-discrimination laws relating to employment, so they could avoid engaging people with certain characteristics. In this regard the client companies are aided by the labour hire process, in that they as non-employers can select or not select from a short list of candidates submitted by an agency. The agencies concerned thought that discrimination issues were a big reason or driver for the expansion of labour hire.

Sometimes agencies felt that what the client was requesting was not a case of discrimination, but a case where the client was attempting to ensure that a person was obtained who could do the job in question. The situation appears more doubtful where the agency assisted a client in rejecting a potential candidate, on the basis that the candidate would be incompatible in a particular workforce. Some agencies mentioned that they now had to take extra care, given the *Privacy Act 1988 (Cth) and Guidelines*, as to what they said about employees on their personnel files.

One agency, while having to deal with a few cases of discrimination itself, was strongly of the view that employers were attracted to labour hire, so they could discriminate amongst workers.

Of the thirty-four respondent agencies, twenty-four agencies indicated that they had experienced few cases of discrimination, or did not consider it a major problem. A range of reasons were advanced for this, from maintaining clear equal opportunity policies, to being proactive in early investigation of potential problems, to candidly acknowledging to seeking the right fit of worker for a particular position. Some agencies were quite forthright about adopting an equal opportunity policy or stance. Their attitude was that they could not help a client discriminate against candidates in any way, and they would employ anyone as long as the person had the appropriate skills. Under this approach for example they would send to a client resumes for both males and females, even if the client had requested a person of a particular gender. The attitude was that the legislation was clear as to what their obligations were.

Where there was an initial complaint of discrimination, as mentioned agencies would investigate at an early stage at the client site, in an endeavour to resolve the issue. In one situation a prompt investigation with the client led to an official warning by the client to its permanent employees, and a realignment of the workplace to everyone's satisfaction which enabled the hired worker to stay on in his role. In other situations where resolution could not be reached, the agency's attitude was that the person was not sent back to the site. As one agency noted: "There may be no proof either way, and you certainly cannot accuse anybody of doing anything if you cannot prove it".

It was pointed out by one agency that not all discrimination was unlawful. The agency instanced a case where a client had not wanted people with beards, and the agency had acceded to that request, because it was not unlawfully discriminatory as such. Similarly it was not discriminatory where lifting loads were imposed on the sexes, in the interests of safety. By way of contrast it was against the legislation, if proven, to discriminate against pregnant women. For one agency the bugbear here was maternity leave, and the guaranteed right to return to work after it.

Another agency advanced the view that at times claims of discrimination were arising from a sector of the workforce that was becoming disgruntled by the casualisation of the process. Perceptions of discrimination were developing in a workforce unhappy with their role. According to this particular agency this was going to be a greater issue for employment organisations.

As mentioned, agencies were often governed by practical considerations in pre-empting discrimination claims. A common attitude was that getting the right fit of candidate for a particular position obviated potential difficulties. While agencies appeared generally to push the claims of all available candidates, there was a ready realisation that in the interests of client and candidate it was best to place someone who would be a good "cultural fit" in the workplace. Otherwise the client was not going to accept the good worker and the worker would not be comfortable in the environment. As two agencies put it, it was not in their commercial interests to send somebody out that the client was going to reject quite openly, or who would be "wasting" the client's time.

One agency in particular referred to cultural fit problems with certain types of workers (such as Indian accountants) in Australian workplaces. The agency stated that, if it advertised for accountants in newspapers, it could guarantee that "half of the applicants would be from the University of New Delhi". The problem for the agency in its experience was that usually such people did not last more than three months in an organisation, because of cultural fit and other issues. Thus it appears in practice that at the expense of employees' interests, agencies regularly attempted to forestall potential discrimination problems by putting up candidate workers to a client that they believed would fit into the client's work environment.

On the subject of workplace discrimination generally, one agency made the interesting observation that "discrimination issues are a big reason for the expansion of labour hire", in the sense of normal employers discriminating against potential candidates, such as those with off putting features such as body piercing or tattoos. The agency pointed

out that under anti-discrimination laws normal employers as a rule were supposed to pick the best person for a job, otherwise they could lay themselves open to possible claims of discrimination.

The special attraction of labour hire for client organisations was that they, as non-employers, could choose freely from the list of candidates submitted by the agency as legal employer, without the fear of being accused of discriminating as an employer. Under labour hire, it was the client and not the agency as legal employer who had the ultimate discretion on who was placed into the worksite position. Labour hire thus offered for clients a potential way around the applications of anti-discrimination laws.

The remaining group of ten agencies (out of thirty-four) opined that discrimination was or had the potential to be a fairly common occurrence in labour hire, and did occur with respect to sex or gender, race, and age. A view was expressed that it was not discrimination where a client or host employer was after someone who was best capable of doing a particular job, taking into account the fitness requirements of the job.

It may be a more borderline situation, where as alluded to earlier, an agency indicated that in helping to select candidates it took into account the 'cultural fit' of a client's workplace, and whether a candidate would fit into that work environment, particularly where the candidate's views were not sought on the matter.

While all ten agencies thought that discrimination was a problem in the labour hire area, for some agencies it was an issue that arose more frequently or created greater difficulties. For one agency every type of discrimination had arisen, with the three dominating being "age, sex and race". Another agency commented that a large number of candidates had disclosed problems with discrimination on sites in previous employment.

One agency in this group highlighted how it could be awkward for an agency where a complaint arose at a workplace. The agency related that it had been caught up in one situation because it was the legal employer of the complainant, even though it was a supervisor of the client that had made the offending comment. The agency stated that it, in addition to the client, had ended up having to pay compensation to the aggrieved complainant.

Another agency considered that labour hire agencies were prone to discrimination claims at the appointment stage of employees, because clients as non-employers, while not being able to advertise along those lines, could suggest subtly to agencies their preferences for employees, which on the face of it could be discriminatory. In such a situation it was thought that the agency was "very susceptible" to claims. These views were backed up by another agency, that indicated that its clients were very free about stipulating whether they wanted a male or female for a job. The agency's response was that it could not discriminate, and whether the best candidate was male or female it would put that person forward for consideration.

One interview with a member of the second group illustrated how trying a situation it could be for an agency, when a discrimination claim arose. The situation in question concerned a welder who had a sex change to become a woman. A consequence was that the person had to dress as a woman and use female facilities. The person's placement caused great problems for the agency, because the person was not accepted by the workforce in different workshops. The person's position could not be resolved by the agency and in the end, the agency no longer engaged the person.

More generally agencies in the group acknowledged that they had to deal with the issue of the clash of cultures and values at a workplace. One nursing agency instanced problems in this regard, for example old ladies or Muslim women not wanting male nurses at nursing homes; and Vietnam veterans in a mental health setting being upset by anybody of Asian descent. The agency noted that the discrimination was based on a culture, the values of the people being nursed. It also observed that the legislation allowed for some limited exceptions (such as religious grounds) to the prohibitions on anti-discrimination.

As with the first group (of 24 agencies), agencies in the second group indicated that they tried to reduce the likelihood of discrimination claims, by taking into account the work culture before recommending placements at a work site. Where there was potential for a clash between a new worker and others on a site, one agency stated that it would mention this to a candidate, and ask whether the person still wanted the assignment. Other agencies similarly took into account whether foreigners with

language difficulties would be compatible in a workforce, or whether older workers would be able to tolerate a physically hard work environment, or would be comfortable in a computerised environment. On the latter point, one particular agency was firmly of the view that age discrimination was rife against people over forty years of age, on the basis that older workers lacked the ability to change and be re-trained.

There was a general view then that the problem was one of perception, particularly on the part of clients. For instance, as mentioned in the first group, one agency referred to a perception among clients that had existed in recent times, that Indian accountants who were on the increase were not up to standard as regards qualifications and skills, including language skills. In such a situation, it was felt that an agency was caught in the middle, but still felt obliged to offer such persons as candidates to reluctant clients, lest they be considered to be discriminating. This was particularly the case given that under the new *Privacy Act (Cth)* applicants could access their files.

6.5 Qualitative Responses

6.5.1 Benefits of labour hire – the Client view

This data draws attention to the key underlying themes of this study, that because of increasing regulatory obligations and costs employers have had incentives to utilise less regulated markets such as labour hire, to avoid regulatory obligations such as those under unfair dismissal legislation. This trend is further encouraged where there are perceived to be further benefits such as flexibility in the recruitment of staff and reduced labour costs.

As only agencies and not client organisations (apart from some peak bodies) were interviewed, the benefits of labour hire from the clients' viewpoint are gauged from views expressed by clients to the agencies, and from the perception of agencies as to the benefits for clients arising from continuing interaction with clients.

In summary the following matters, which will be dealt with in order, were advanced as the benefits of labour hire from the client perspective:

- Flexibility in the staffing of a workforce (31 agencies)
- The convenience factor in recruitment and human relations management (19 agencies)
- The unfair dismissal laws (19 agencies)
- The avoidance of employer responsibilities by companies and the perceived need to escape from excessive workplace regulation generally (17 agencies)
- The trialling of employees ("try before you buy" approach) for permanent positions (7 agencies)
- Reduction of costs and easing of cash flow for companies (13 agencies)
- The provision of flexible work patterns for employees (1 agency)
- Handling skill shortages in the workforce (7 agencies)
- Avoiding the training of employees (5 agencies)
- The opportunities for workers to improve their work skills (12 agencies).

(a) Flexibility in staffing of a workforce and the convenience factor in recruitment and human relations

All but one of the thirty four labour hire agencies were of the view that clients were drawn to the flexibility in staff management afforded by the use of labour hire.

The agencies pointed out that labour hire offered flexibility in various ways. One agency put it succinctly that using labour hire gave clients flexibility by being able to accommodate fluctuating demands in the market place, through the opportunity of using a temporary labour force to upsize and downsize their business in short time frames. To one agency it was the number one reason why labour hire was used. One large multi-national labour hire agency similarly expressed the view that "basically labour hire works in that it actually services the peaks and troughs of a person's business". It was pointed out that this was why labour hire was referred to as "flexible staffing".

Labour hire in the view of the agencies also afforded convenience in terms of the need to recruit and interview staff, because those roles are performed by a labour hire agency. One agency referred to the fact that clients could ring for staff and be supplied with people straight away, whereas, if they had to go through the process of finding casuals themselves, it would involve time and effort for them.

The flexibility and convenience of labour hire reduced the strains of human resource management for clients. As a large local agency noted, a client did not have the hassle of putting somebody on full time. In this regard one labour hire manager

opined "I think the benefit to the client is to be able to take them on, and if they don't work out, to get rid of them quickly". A client could keep an agency worker only as long as needed, and a labour hire agency as the legal employer looked after payment of all the associated costs of an employee, such as superannuation, workers' compensation premiums and payroll tax.

The administrative convenience factor was echoed by agencies in general. Apart from the general consensus among agencies of labour hire providing flexibility in the workforce sense with respect to production requirements, agencies highlighted the benefit to clients of using people in agencies who have become specialised in personnel selection and human relations management. Agencies supplied personnel who were believed to be job ready after screening and interview processes. According to the agencies they had become skilled at selection processes, because they were doing it on a daily basis and with ready access to databases.

Some of the labour hire firms adverted to the notion of a core workforce in the workforce flexibility argument. The benefit to clients here was that they could focus on working their business, engage minimum permanent staff levels, and let the agencies as professionals in recruitment deal with supplementary staffing issues.

A large multi-national labour hire firm drew attention to having in this way a more effective cost base for clients (such as hospitals and nursing homes) to operate by, because for instance they would be paying for specialist staff needed only for the

duration of a project. Thus a client could balance "actual head count" to the "actual needs and workflow demands". In this regard there was a common agency sentiment that there was a particular attraction to clients in being able to bring in specialists for particular project skills on a short term basis. As a sidenote to this sentiment, one agency was advised by clients that specialist and non-specialist workers as temporary workers were attractive to clients, because they were there to do particular work and were not distracted by "office politics".

(b) Unfair dismissal laws

Nineteen of the thirty-four agencies (56%) directly referred to the fear of unfair dismissal legislation and other employer directed legislation as being a reason for the use of labour hire by client organisations.

The 19 agencies made reference to the advantage in that labour hire workers could be dispensed with relatively easily, in comparison to permanent employees who may be able to access the provisions of the unfair dismissal legislation, if dismissed. Under the Federal and Queensland legislation an employee is permitted to pursue a claim, where the termination of employment is "harsh, unjust or unreasonable" or for an invalid reason (such as trade union membership). As one agency remarked, a client can say "don't send him back, I have got no work", and in so doing there was no confrontation, no risk of laying somebody off and there was no risk of unfair dismissal.

Comments were also expressed by agencies that, based on the reactions from clients, the unfair dismissal legislation was a leading aspect of the industrial legislation in general (such as the laws covering workers compensation, occupational health and safety, and superannuation), which was acting as a driver towards a greater use of labour hire. One agency for the liquor industry noted that, because of the unfair dismissal and other legislation, there was a strong incentive for businesses not to carry the burden or responsibility of being an employer, and to have all their staff organised by the labour hire industry.

One agency owner in particular was more forthright than others about the effect of legislation, such as the unfair dismissal legislation on employer attitudes to the engagement of staff. The owner stated that "the (labour hire) industry largely exists because of the excessive regulation in the permanent workforce. We are a creature entirely of the legislation".

The owner went on to comment further: "That section of the market has grown dramatically; the response of labour hire is really an extension of the same thing that is driving the casualisation market. The whole thing is driven in Australia by excessive regulation, which makes it uneconomic to employ people. So we are fundamentally creatures of excessive silly government regulation. It is contradicted by the American experience which is a deregulated market place, and labour hire is huge over there. I think the growth over there is probably generated by different

reasons to what it is here". The agency owner concluded by saying that "the unfair dismissal laws, the more they strengthen them, the busier labour hire will get".

Other agencies varied somewhat in their views on the impact of legislation such as the unfair dismissal legislation. One agency respondent was of the view that the unfair dismissal legislation was a factor in the choice of labour hire by companies, but that its effect was hard to quantify along with a whole series of factors that some companies took very seriously. For some companies there was not a particular concern about employment law aspects. On the other hand the sentiments expressed to a number of agencies by clients was that clients thought that there was a big benefit in the flexibility afforded by labour hire, in that they could hire and could get rid of people without the fear of unfair dismissal claims. According to one agency, many companies had revealed that they were scared of employing and being able to dismiss people, especially those who had been "burnt" in the past by industrial relations issues.

As regards claims for unfair dismissal, one agency singled out 1995 as a particularly bad year for companies.[2] The agency owner stated "in 1995 there was an incredible increase in unfair dismissal claims as a result of that, and it seemed every man and his dog was making a claim. I think it frightened a lot of employers in the small business sector and probably some of the other sectors, with regard to ease of employing staff. So I think people generally look for more flexible arrangements".

[2] The former ALP-introduced federal unfair dismissal laws had been in place for a full year by then.

(c) Trialling of employees for permanent positions

Six labour hire agencies specifically referred to the fact that client companies will use labour hire with a view to "trialling" a labour hire worker to ascertain whether that worker would be a suitable permanent employee of the workplace.

A common response from the agencies was that labour hire enabled business organisations to "try before you buy". In other words a lot of clients used labour hire to look at and try out people, before they took them on as employees on a full time basis. One respondent agency pointed out that client companies will often take on technically competent people for temporary roles, for an opportunity to assess them and for them to assess the organisation, with a view to hiring them permanently at the end of the trial period.

One agency in particular pointed to the advantages of this arrangement, by pointing out that a prospective employer obtained a double probationary period in respect of a prospective employee. The selling point to companies was that they in effect had the workers under probation while the workers were the employees of the agency, and then had the workers under a three month probationary period with the companies. Thus the companies were getting an extended probationary try out of the workers. An added bonus referred to by agencies was that during the trial process an agency carried the overall obligation or risk that a labour hire worker was a good fit in the work environment. Where there was not a match of the correct candidate for the job

description, the client always had the option of sending the worker back or in extreme cases not paying the agency's account.

From what the respondent agencies indicated both orally and from their documentation, labour hire workers went on a set trial period according to the agreement of say three months, and if the labour hire worker was taken on permanently by the client company, there was invariably a placement or conversion fee charged by the agency to the client company.

(d) Reducing costs and easing of cash flow for organisations

Nine of the thirty-four labour hire agencies directly referred to the cost benefits associated with using labour hire workers for clients. Notwithstanding that a client company has to pay a 23% - 25% loading on the permanent rate for the hire of a labour hire worker, a number of agencies were of the view that there were clear cost benefits in the utilisation of labour hire rather than permanent staff.

In their view the cost benefits for clients lay in not having to bear short term and long term costs associated with having permanent workers on staff, such as those for superannuation, annual and long service leave, sick leave, payroll tax, and workers' compensation. Under the labour hire arrangements the only relevant subsidiary costs (superannuation, payroll tax and workers compensation) were taken care of by the labour hire agency. As one agency pointed out, a cost advantage of labour hire for a client was that a client knew up front and could factor in what a labour hire worker would cost, which was the charge out rate of an agency.

Added to those perceived cost savings from the clients' perspective, there were also reductions in the general administrative and operational costs involved in the administration of staff. Even mundane matters such as the supplying of uniforms could be obviated. One agency mentioned that in servicing several clients it used economies of scale to keep human resource costs down for clients. It mentioned by way of example that "we have two girls in payroll handling 1200 odd employees. Now normally, if you employ twenty-five people, you would have a girl on full time five days a week looking after payroll and associated matters". Given that the labour hire industry was very competitive, there was an agency view that the service fees or margins for these administrative services could be quite low, particularly where agencies were relying on volume of turnover.

Three of the nine agencies specifically referred to the special cash flow advantages obtained by clients through the extension to them of credit payments by the agencies. The standard situation in labour hire is that the agency pays the worker up front and then recoups that cost from the client company. In many situations the client company is then given a certain period of time in which to pay the account.

The widespread practice of providing credit to clients was mentioned in the interviews as a great benefit to clients, because it reduced cash flow problems for them. One agency commented "it (labour hire) releases a lot of cash flow, because we have to pay the people, then we invoice them and they have got time for payment. It might be 30 days, 7 days, 14 days and that is how clients keep their cash flow

going. So that is one of the biggest benefits". It thus appears then that through the provision of credit under labour hire, client bodies can delay the payment of employment costs. Further under such an arrangement an agency can carry the risk of bad debts, such as where client companies go into liquidation. An agency noted that there could be trouble "where with a company in liquidation the liquidator tries to recover money paid to the agency within six months of liquidation".

(e) Handling skills shortages in workplaces

Agencies supplying niche market made reference to the special use of labour hire in handling skills shortages in workplaces. In particular reference was made to the use of labour hire for work on special or specific projects. It was pointed out by those agencies generally that labour hire supplied workers with special skills that were lacking or deficient in the normal workplace team of employees. This occurred in numerous areas such as engineering, drafting, financial services and architecture.

There was a general feeling among the agencies that labour hire was suited particularly to project work that clients such as engineering and drafting companies engaged in. Firstly a project (such as designing a bridge or building a machine) usually had a limited life cycle, so as one agency put it, "it suits the clients that they are able to ramp up quickly by engaging a whole series of contract staff, and when the job is finished shedding them all out of the door on virtually no notice, until such time as they pick up another project".

From the clients' viewpoint, agencies offered quickly trained and quite technically able people, who could be used for the short or medium term and then shed when the project concluded. Further, as one agency noted, under the legal relationship of labour hire, the specialist staff engaged for the duration of the project never became the legal responsibility of the client companies, but remained that of the agencies (unless they were operating as independent contractors). As regards project work then, the view of another agency was that "having them on as permanent staff just is not a practical way to go". The same agency explained that, even with the filling of government positions, it was very much easier for a government department to get approval for a labour hire worker to come in, than for the filling of a permanent position.

Labour hire is used to deal with skills shortages. Some mention was made by agencies as to the reasons for workplace skills shortages. One observation was made that skilled shortages resulted from mobility in the workforce today:

> So there is a lot more mobility in the workforce, and this is also heading to skilled shortages in the workplace. If you took a medium and long term view we are going to have continuous skill shortages globally, for example in information technology.

Another opinion was to the effect that skilled shortages resulted from continual restructuring by companies, and employees were being out-structured by companies at age 55, because they were more expensive. Companies then found that skills were being lost, and needed to be replaced. In this regard, one labour hire agency set up by a union for professional workers indicated that there had been a demand to bring

back displaced workers as labour hire employees for example on a six months contract, to participate in a programme to mentor and pass on skills to younger employees.

One agency owner even referred to a special labour hire arrangement whereby her agency undertook to train airport workers from the beginning for a three to six month period, after which they were moved across to permanent vacancies with an airline company. Another special arrangement to fill skills shortages was where another labour hire agency offered a very specialised service, in that it was a government backed corporation which specialised in the supply of technical apprentices on a labour hire type basis to businesses, that were not prepared to put on apprentices and trainees where they could not predict their future needs. Such schemes, called group training schemes, have been set up to help small businesses employ apprentices in areas of need.

(f) Employee training

Only a very small group (three) indicated that labour hire was used by client companies to avoid having to train employees. One agency put it in this fashion:

> They (the clients) haven't got the time or resources to find staff, train staff and put them in, so they utilise labour hire, it is a quick fix. In a nutshell, that's basically it.

One agency said that the expectation from clients was that, upon ringing for an agency worker, they would be supplied with a person with up to date skills, who would require very little training and be fully ready to start. An agency in the

security industry concurred with this approach, in that it believed its role was to train its hired out workers so that they were "up to speed" before being placed out.

One specialist body involved with the hiring out of industry apprentices along labour hire lines, placed a strong emphasis on bringing in unskilled people, and then developing the skills of those people during the course of their apprenticeship, through careful monitoring.

6.5.2 Benefits of labour hire – the Worker view

As was the case with the client view, the benefits of labour hire from the worker viewpoint are ascertained from views and impressions given by workers to agencies, and from the direct views of some sample labour hire workers. The benefits to a worker will be explored from those two perspectives below.

6.5.2.1 Worker view according to the agencies

Overall there were a number of benefits associated with working in labour hire. These included flexibility and variety in employment opportunities; access to employment opportunities; and access to higher wages and to improving work skills. These benefits will be explored in detail below.

(a) More flexible work patterns for employees

A high proportion of agencies (29 out of 34) cited this heading as a reason why people wanted to work in labour hire. Those agencies were under the

impression from various workers that the workers enjoyed the benefits of variety and flexibility that labour hire provided.

A common impression conveyed by workers was that workers were attracted to working in labour hire, because it gave them the independence and flexibility to work as and when they desired and to move around and work for different organisations. Some female workers in particular appeared to appreciate the flexibility to be able to adjust their working times to fit in with family needs.

One agency commented briefly that "people like to work in labour hire organisations because of the flexibility. They can work when they want, leave when they want". Other agencies said that some workers were attracted by the flexible lifestyle associated with labour hire. One agency stated that "some people love it....it is a means to an end. The single mums or whatever, the single dads and the other people that just follow those projects for instance, they do nothing else". Another agency noted in passing that "we have had people on our books for years, who we send from one client to another, and they are more than happy with that lifestyle".

One agency, which specialised in labour hire employment for professionals, indicated that the flexibility of labour hire was an attractive proposition for its workers – "a lot of contractors (labour hire workers), the engineers and draftsmen, prefer the flexibility, they like to work on high profile projects.

They go where the work is provided, they get their hourly rate, and financially the good guys do better on contract than they do on staff".

By way of contrast two agencies specifically cautioned against pushing the benefit of flexibility too far. One agency operator thought that fundamentally "everyone wants job security and in labour hire no one has job security". The other agency observed that the lifestyle of working in labour hire might not suit everyone or most people. It was of the opinion "that most people like to be anchored to a particular job. I think you and I probably recognise that not everybody can.....go around and do different jobs all the time. That is why agency nursing does not suit everybody all the time....it is a fairly high turnover".

(b) Access to employment opportunities

There was a general feeling that labour hire agency was regarded as beneficial by workers, because it gave them an avenue to employment where it might otherwise be unavailable. The response tended to refer to fundamental matters such as getting a start in employment, employment choices or options to improvement in work skills. Twenty-four (out of 34) agencies considered that people were working in labour hire not through choice, but because they could not get permanent work because of the job market or personal failings. One basic comment was "the advantage of working for labour hire is getting your foot in the door with an employer".

A cross section of agencies pointed to various reasons why people were finding it hard to get a permanent job. Agencies highlighted the position that unskilled workers particularly found it difficult to obtain permanent work. One agency noted relevantly:

> A lot of those people in lower socio-economic areas, the males particularly, are labour hire employees and they do it all the time because this is where they pick up work. They can't get that permanent job. Basically they are unskilled labourers. Employers generally will use labour hire organisations for that unskilled workforce.

This position was corroborated by another agency that stated that "in some cases people would prefer to have a permanent job, but because of their skill level, they are having difficulty getting permanent work. They find it easier to get into temporary and of course in some cases temporary goes to permanent". Interestingly enough one labour hire operator had had first hand experience of the difficulty in obtaining permanent work, and of the opening to employment that labour hire offered. He stated:

> Why I started in labour hire, I can tell you that, is because at the time people were not employing and it was the only way you could get a bit of work, and it led to the case where I am sitting here today.

Notwithstanding the difficulty in obtaining permanent work, one agency owner was firmly of the view that labour hire workers should be encouraged to keep trying for a permanent job, either with the client or elsewhere, because "you cannot make a career out of working for a labour hire company". The attitude should be that a worker should treat every start as an opportunity to work towards a permanent position.. In the experience of the particular agency, about

one in ten people had started with a client, and subsequently had been offered full time positions.

It was pointed out by agencies that the tightening of the labour market was due in part to the downsizing and redundancies occurring in companies. In this regard one agency pointed out:

> There has been a lot of redundancies around lately. It is a self-evident fact, the CEO never goes, but someone around middle management does. It is a fairly large overhead, as well as relatively easy I guess to do without in a certain way. Where they were doing a good job and had the respect of co-workers, their self-esteem is shot.

Because of the downsizing going on, one agency took an original view on job security that some labour hire workers in effect may have as much work tenure as their so-called permanent counterparts. The agency commented:

> Some people are professional temps; they are probably more secure in their working habits than people who have a permanent job. Who knows when your company is going wheels up or they are going to downsize. Ansett, HIH, banks are just downsizing hugely, they have been putting on large numbers of temp staff and it is amazing. I am always bemused when people jump up and down about job security, because the average tenure of employment at the moment is around about two years, either plus or minus a couple of months. People want a job for life, but they don't want to stay there anyway.

Other agencies referred to labour hire being a benefit to workers with personal failings (perceived or otherwise), by at least offering the opportunity of some work. In some cases these workers might have been rejected by permanent

employers because they were considered old or overweight. For other workers the problem might lie with their work performance. One agency noted that:

> The bad side I guess is people can't hold down a permanent job, because they are just rovers or they can't maintain a job for too long through whatever reason, concentration or they are just unreliable and they're put off.

One particular group of workers, considered to be benefiting by the access to employment provided by labour hire, were those after short term or transitional work. Eight agencies felt that labour hire fitted the needs of people who were travelling or were transients, or who were in the process of relocation or work transition. One agency commented that:

> A lot of contractors (labour hire workers) out there are in between permanent jobs, that is to say, they are actively looking for permanent jobs and do contracting while they do that search.

A more succinct comment by an agency was that "a lot of them do it just between permanent jobs, so they fill in til they find a permanent job that they like". The person added that "I would say there are more people doing that than doing it as a lifestyle choice".

As to those relocating, labour hire offered the opportunity "to test the waters" of the new employment environment. In this regard, one agency stated:

> People who relocate here from Sydney or Melbourne, who have no idea about the employment market here, decide to go temping to see who is doing what, who is hiring, what the cultures are like in the firms, who are the good employers, who are the bad ones.

A final group, that benefited from labour hire in the view of agencies, were those persons who benefited through the acceleration of their careers or an extension of their working skills. The comment was made that "some people fast track their careers through agency work, because they get to go to different jobs at different levels and to different projects and their resume expands faster". Another comment in a similar vein was that "it gives them the opportunity to improve their skills by being offered differing assignments".

(c) The potential for higher wages and greater rewards for skills

Twelve agencies cited the potential or likelihood of higher returns for workers, particularly for those with special skills, as one of the attractions of labour hire for workers. Some agencies considered that workers were attracted by the prospect of getting more cash in hand or upfront at pay time, by virtue of the casual loading on top of the normal wage rate (about twenty-three percent), that was given to the labour hire workers for forgoing entitlements such as holiday leave, long service leave and sick leave. In other situations it was pointed out that labour hire workers gained through being rewarded for their special skills, or through being able to work longer hours. There were random comments from the agencies that "remuneration is the big point" and "money is a big motivator".

Six agencies referred to situations where pay rates were high for labour hire workers, who were specialists or who had skills in short supply. The agencies

agreed that professionals and tradespersons, whose skills were in high demand, could command high wages by virtue of supply and demand forces.

One agency referred to the situation for highly skilled labour hire workers in these terms:

> We don't actually have award rates. We have market rates, so we have people from $15 an hour up to $60 an hour who are engineers. The market really sets it. If you are a specialised person, you could probably ask what you like.

Another agency cited the example of maintenance workers in engineering industries who were very well paid for doing intensive agency work, while machinery was shut down. While the work was for short periods of time and on an as needs basis, wages were a lot more than the permanent rate.

As indicated the common sentiment was that the demand for specialist services was market driven, and that market rates could be substantially higher than award rates. One representative comment was as follows:

> I think the good ones have a capacity to make better money, which a lot are motivated by. For example, for a drafter the award is $13-$14 an hour; the average hourly rate would be $35 an hour. With the technical people, the engineers and drafters, it is market forces, there is not a standard.

One agency in particular highlighted the potential for workers to obtain more hours of work through labour hire. This agency started that it had specialised in supplying people as independent contractors under labour hire arrangements,

until the change to Queensland legislation (Section 275 of the *Industrial Relations Act 1999*) whereby independent contractors could be deemed to be employees. The agency went on to say that after that it was using Australian Workplace Agreements (AWAs) to engage labour hire workers, under which there was a flat rate of pay, no penalty rates or overtime and the same rate twenty-four hours a day seven days a week. The agency claimed that most of its workers were on those arrangements and that those that were obtained more hours of work.

Despite the apparent monetary benefits to some labour hire workers, one labour hire manager sounded a note of warning to people who may be attracted initially by the prospects of higher wages in labour hire. In his view, workers in society could pay a heavy price for the giving up of job security, which was inherent in labour hire.

He acknowledged that sometimes "the pay is better", but then went on to make the following comment:

> I don't know if socially we are doing it right. Realistically I don't know because I think everyone wants job security and in labour hire no-one has job security. So in the long term, I don't know. For the whole world and the whole country to turn this way, I think it would be destructive.
>
> A lot of people can't handle first-day jitters and having first-day jitters everyday, going from employer to employer, the majority could not handle it. When we go to a client we like to work on the rule of thumb of twenty-five percent of their workforce should be casual.

6.5.2.2 Direct views of labour hire workers on the benefits of labour hire

Discreet enquiries with unions had indicated that labour hire workers were generally reluctant to be interviewed on labour hire issues, notwithstanding the conditions of anonymity. However, three labour hire workers agreed to be interviewed individually at some length, on inter alia whether they saw benefits in working in labour hire. The three workers expressed opinions ranging from statements that "you can get the best of both worlds" to "the positives were very few". The worker from a white collar area saw some distinct advantages in working in labour hire, and could see that labour hire work could appeal to people wanting flexibility or an interim job. In contrast, the remaining two workers who were from an industrial setting were quite critical and saw few benefits.

6.5.2.3 Views of white collar worker

(a) Flexible work experiences

In the opinion of the female white collar worker the major benefit or positive aspect of labour hire was the flexibility of work hours that it offered. She commented as follows:

> The main benefit of labour hire is the flexibility it gives you. If you were lucky enough, as I have been, to find an employer who will take you on for a long term assignment and at the same time be flexible with your hours, you can get the best of both worlds.

The female white collar worker went on to add that in her view, labour hire "is not suited to those workers seeking reliability, but definitely suited for workers who are still deciding what type of work they would like to do, or who have a lifestyle that requires flexible employment."

She felt too that other positive aspects of labour hire were the interesting employment experiences that it could provide, through getting an insight into different types of work and in meeting different people. This was particularly the case where the agency involved was supportive. The worker felt that her most rewarding labour hire experience had been in lending work with a bank, where the agency had been obliging and had checked regularly on her situation, and had arranged meetings for her with the other labour hire workers. In her estimation, if she were to work in labour hire again, she would definitely go through that agency again.

(b) Insecure nature of the labour hire relationship

In the view of the worker however, there was a downside to working in labour hire because of the nature of the relationship. She commented generally:

> However labour hire is not the most rewarding mode of employment. You can sometimes feel inferior because you don't have the benefit of guaranteed pay, holiday leave or sick pay, even though the hourly rate is meant to cover for these things.

Because of the nature of labour hire too, the worker felt that she did not have much loyalty to an employer, in light of the fact as a labour hire worker she could be dismissed at short notice. The uncertainty of employment was reciprocated by a lack of loyalty in the worker. She stated that "the fact that my employer could dismiss me with 48 hours notice also meant I did not feel a huge amount of loyalty to them". Added to this at times was a feeling that management gave priority to permanent

employees, and that her rate of pay did not seem to equate with the amount of work done compared to others.

More subsidiary drawbacks to labour hire, that did arise, according to the white collar worker, were a lack of variety or boredom experienced in job roles and a lack of rapport with permanent employees. The worker thought that the lack of variety was probably due to monetary reasons in that if the situation were otherwise, the holders of position would have to be paid different rates and it was easier to keep everyone affected within the same kind of role. This could be alleviated, as one agency did, by rotation of staff through different roles to cover loss or absence of staff.

As to the lack of rapport that could exist with permanent employees, the worker sensed that this was due to the number of hours that she worked and because permanents thought that, as there was a high turnover of labour hire workers, it was a waste of time to get to know them. She also noticed that some permanent workers held the opinion that labour hire workers were taking their work and found them to be a threat.

6.5.2.4 Views of industrial workers

In comparison with the white collar worker, the two industrial workers thought there were few benefits associated with working in labour hire. They were overall sceptical and considered that labour hire created an environment of fear, little loyalty, financial instability and anomalies in practice, such as the client company as

the non-employer determining the start and end of the labour hire employment relationship.

(a) Financial rewards for specialist workers

As to the positive aspects, they were that labour hire was an avenue to work and that it could be financially rewarding for professional workers and those prepared to work long hours. One of the workers commented generally:

> The positives are very few. The positives are that there is always some work there – there are so many agencies. All you need to do to get a job is to make x amount of phone calls.

The same worker also observed that "when I am working I can turn a reasonable dollar. I can chase 80-100 hours a week when it is on".

It was also conceded that "it would suit professionals. Some people are quite happy for sure in legitimate casual work".

(b) Insecure nature of the labour hire relationship

The two industrial workers however saw a number of negative aspects to working in labour hire. First of all, they both were strongly of the view that labour hire was a stressful work environment to be in. One of them put it that "physically, mentally and financially labour hire is too stressful for workers". The other worker commented that most of the people he knew wanted to get out of labour hire,

whether they happened to be in manufacturing, the motel industry or construction work.

Both workers highlighted the lack of employment security associated with labour hire, due to the inherently temporary nature of the industry. One of the workers, who had worked in many labour hire jobs thought that the work offered by labour hire could be of too casual a nature. He expressed the following opinion:

> You live from day to day, week to week, hour to hour. The concern I have is that you live like a gypsy and there is no continuity of work unless you get yourself into an organisation with labour hire and you stay there for a couple of months and they are very few and far between.

It was pointed out by the two workers that, even where labour hire work was obtained, many still experienced a lack of financial security due to receiving lower wages and to the difficulty in obtaining loans from financial institutions. One of the workers involved in boilermaking stated that "my wages have dropped dramatically under labour hire. What labour hire is doing is driving down wages in other firms. It is a race to the bottom". As to disparities in wages, the other worker instanced a personal situation where there were five different labour hire suppliers on a work site, all providing different pay rates and allowances for the same work.

The same worker further stated that he had talked to his peers and their concern was about a basic difficulty to obtain finance to buy things. This difficulty was corroborated by the other industrial worker, who considered that there were real problems as a labour hire or casual worker in obtaining loans at reasonable rates from banks and other financial institutions. As a personal example, the worker

confided that, despite working in labour hire for several years, he could not afford a car or a mortgage on a house. When he last tried for a bank loan eight years previously, he had been told that as a casual worker he did not qualify. He added that, even if he were able to obtain a loan, he would not be confident about making the repayments.

Apart from the possibility of financial insecurity, it was the view of the two workers that people suffered personal insecurity while working in labour hire positions. People were reluctant to complain about things that appeared wrong, because they feared losing their jobs if they did so. This position was exacerbated by labour hire selection processes, which did not send the right people to the right jobs.

One result of the preceding factors according to the two workers is that there was little loyalty by labour hire workers to their host employers and vice versa. Amongst other things the shortness of a placement might preclude getting to know the culture of a particular company.

One of the industrial workers was alert to an apparent legal anomaly posed by the labour hire situation. He noted that it was the client or "host employer", that was the effective decision maker as to the commencement of employment. He remarked:

> There was a particular job with an agency. I said 'when does the job start?' They said 'we don't know'. So all they are doing is collecting names and then the host employer, which is strange, makes the decision of who actually starts that particular job, not the labour hire company. They just collect the names and then the host company makes that decision.

> So the concern I have is that the company you are going to work for is really dealing with the application.

Finally, both workers offered a prognosis of a bleak future for many people, if the trend to labour hire were to increase. One commented that "and if they keep on going down the road of labour hire, there will be less people with security and spending money. So the concern I have is where does it all end?"

The other gave a similar pessimistic assessment that "it is the ugliest social tool I have ever seen. It is breaking down our working conditions and our standard of living. It is ruining people".

6.5.3 Reasons for the expansion of labour hire

This issue evoked a wide range of responses from the agencies interviewed and from unions and individual workers. A range of reasons were cited by the parties, with some of the reasons or factors raised overlapping or intertwined. The reasons ranged from ease of entry into the labour hire industry, to perceived over regulation of employment matters, to moves to greater workplace flexibility. As to the future there was some comment that there may be a need for legislative intervention in the labour hire industry. There was also a common sentiment that the labour hire industry would continue to expand in Australia and internationally.

The reasons or factors advanced for the expansion of labour hire can be split into those of a positive nature, and those of a problematic nature which have consequences as to how labour hire is carried out.

6.5.3.1 Positive factors in the expansion of labour hire

These factors are of a general nature and are conducive to employers' adopting more flexible labour market practices, and more specifically embracing the active use of labour hire.

(a) General economic trends

Twelve of the agencies interviewed pointed to general economic factors, such as economic upturns and downturns and globalisation, as a reason for the rise and expansion of labour hire. It was pointed out that a cause or result of globalisation was that in money terms "most companies are more bottom line focused these days". Reference was made to the spurt to casual employment overseas in Europe, because of the doing away of laws that banned casual employment or the use of employment agencies. With respect to Australia, one agency referred to a definite change occurring with the deregulatory labour market policies of the Federal Labor Government of the 1980s and 1990s which were intended to create a flexible, mobile workforce in general.

The agencies concerned were of the view that general overseas and local economic trends had impacted on the way that companies now carried on business. Particularly since the 1989 economic crash, in light of changes in the economy, there had been economic pressures on companies to tighten up, to carry a lean staff and only get people in when they needed them.

Employers according to agencies were now more mindful of the fact that, if they take someone on as a permanent employee and their business started to go down, then they would have to dismiss that person. As a result people were working longer hours because of the economic times. At the same time organisations were becoming more globalised, which gave them more room to expand and more resources, while at the same time facing the challenge to remain profitable and commercial in the face of increased competition. All the preceding factors then have been conducive to the use of labour hire by companies.

One agency comment illustrated the economic trends going on, and their effect on the increase in labour hire overseas:

> I think most companies are more bottom line focused these days and that is a cause or result of globalisation and I think that the area of recruitment and labour management is an area where companies can streamline and get some cost efficiencies, so that is going to be where they will look to improve performance, so it impacts on their bottom line. The call centre industry is a burgeoning industry for banks.
>
> The (labour hire) industry at the moment world wide is a $160 billion industry. In three years they are saying the US will be a $130 billion industry for labour hire. Adecco would be the world's largest as a combination of Adia, Centrecom and Ecco.

(b) Managerial moves towards greater workplace flexibility and efficiency

A large proportion of agencies (twenty-six out of thirty-four) specifically commented on distinct management moves towards greater workplace flexibility and efficiency, which has favoured the greater use of labour hire. Eleven out of twelve unions quizzed considered that such managerial moves were an important reason for the continuing trend towards labour hire.

There was overall agreement among the agencies and unions that companies in general liked the flexibility or ability to put on or off staff (the ease of hiring or firing) according to their business needs. This has fitted in with the rationalising and centralising of businesses that has been occurring. The approach was also compatible with conservative government thinking that, if people could be more easily dismissed, the labour market would be more flexible and employers would hire more people.

As noted by agencies (and by two labour hire workers interviewed), the use of casual and labour hire staff fitted in with the peaks and lulls in business cycles. The point of labour hire was to employ people more economically. The idea was to hire people when there was an upturn, and to let them go when business fell off. As noted by one agency, in effect the "just in time" system, that had applied to the supply of materials for business to save costs and reduce overheads, was now being applied to the supply of employees.

Given the nature of labour hire moreover, its use according to agencies has fitted into the climate of downsizing that has occurred in Australia, due in part to a desire to get shareholders a greater return on their investment. Labour hire also was attractive to management because its precarious nature was conducive to increased management power over employees. One agency put it as follows:

> I suppose one of the ways a lot of the employers have gone over the last ten years is that they have downsized considerably, and labour hire has given them the flexibility to put people on at peak times. So run with the skeleton staff when

> they need it, and put people on at peak times. That is the flexible arrangement, and you are seeing it across a whole range of organisations. So people don't want people who are not working to capacity, or who they don't have the capacity to utilise at any one time.

This flexibility was described by one agency as changing "what has persistently always been a fixed overhead into a variable overhead". In this regard, reference was made to a large number of US companies who, because their way of reporting for the stock market was driven very much by head count of employees, appeared more profitable for their accounting requirements the lesser the head count they had.

An added bonus of labour hire in this context, as pointed out by one agency, is that it provided an employer with a substantially greater capacity to increase or decrease staffing numbers, but without any direct employment relationship and obligations. It gave employers the flexibility option to have employees so to speak, without any employment relationship. Support for this was provided by another agency as follows:

> I think that is the biggest thing that drives it, in that they don't have to put on a permanent or permanent part-time employee, or in fact engage them as a casual themselves. It is just a glitch in their books for a period of time and then normally they get rid of the labour hire, so there are no real industrial issues they have to worry about.

This desire by employers to rid themselves of their human resources obligations and to give them to someone else was echoed in another agency comment:

> A lot of companies do not want to deal with the industrial relations implications of their having their own employees. It is a way of avoiding permanent employers so if you have a downturn in industry, you do not have to worry about redundancies. It is just bring them in, use them and put them out again. It is a good way of trying out people.

Weight to this comment was added by an agency view that "there has been a huge increase of workers' complaints over the last 15, 20 years"

Essentially though there was a constant sentiment that, in present times, businesses preferred the flexibility and convenience offered by labour hire, to easily fill gaps in the workforce with people who were not permanent employees, particularly where business was volatile and there was pressure on company budgets. The flexibility potential that labour hire had was appealing to businesses "as they are looking for the most amount of flexibility they can get in an employee".

Labour hire was seen as a "quick fix" by the parties to changing production and employment requirements. One union noted that "it seems to work where they have peaks and lulls in the business. When there is a peak, they bring in labour hire instead of employing people on a long term basis". One agency referred to the inherent flexibility of labour hire, when it stated that "they can go and grab five blokes from a labour hire company in peak times for as many days as they want – one day to a couple of weeks or whatever".

Two large agencies concurred that labour hire was particularly suited to flexible management practices. One of the agencies noted its usefulness in particular for project work, when it stated "they have a core staff, then when they get their big projects, they get them in for four months, then they get rid of all those people. It is big in engineering, because of the project nature of engineering". Another agency

did warn however, that using labour hire for project work meant that some companies found that they continued to lack core competencies, for example in engineering, when persons brought in finished a project.

The other agency gave an expansive view on the attractiveness in the flexibility of labour hire to management. It commented:

> All the big companies are now heavily into labour hire, also the banks, local government and so on. When people are busy they have got their labour there, and when it drops off well obviously they can reduce their numbers without the worries of unfair dismissals or redundancy payments. It is really quite simplistic the reasons we are using them.
>
> I think it will just get bigger and bigger. I mean some clients are quite happy – virtually they would have everybody under labour hire excepting themselves. Sure, I mean it is a cruel world and that is a fact. I mean, if a machine breaks down they have that flexibility again – 'sorry, we have to pay the first four hours, but we will let you know when the machine is up again' – so no downtime.

One large employer group saw a long term future for labour hire, because of the flexibility it offered to employers: "but I think the time has come to start seeing that the industry is not going to disappear, it provides a whole host of flexibilities which are demanded, not only desired, but demanded by employers".

In keeping with modern management ideas of efficiency, it was pointed out by both agencies and unions that labour hire offered quick and easy methods of recruitment for business. There has been a conscious management style to use the precarious nature of labour hire employment to get suitable staff. Rather than going through extensive and time consuming selection processes to find the right staff, businesses

used labour hire firms to do that for them, by setting the parameters and then letting the firms come up with suitable employees.

This ease of recruitment according to the parties cut back and streamlined the level of human resources involvement for a business, so that usually a business only had to deal with a short list of people for a position, prepared by an agency. Furthermore, after people were engaged, there was not the need to have to go through a structured process of review and performance management of those employees. Even where the right choice was not made, the worker could be dismissed quickly. Not only in the private sector but also increasingly in the public sector, labour hire firms were being used to carry out the selection processes for positions.

As to the calibre of labour hire employees recruited, one agency interestingly observed that in America "the American market's view is that labour hire people are superior performers to permanent people, so if a person comes from an agency, they are revered as specialists".

There was a feeling in some corporate quarters that recruitment of staff, along with issues such as warehousing and equipment maintenance, was not part of core business, and was best dealt with by somebody who specialised in that area. Businesses were trying to focus on their core business and outsource the recruitment function. One agency felt that "this is the big driver I think". Such an attitude drew a response from a union that some companies could not manage their business, and

rather than deal with management as an issue within their business, they handed it over to an outside service provider to deal with. The union was of the view that managers in a company needed to learn how to plan properly for a company, and to understand the business cycle.

(c) Desire by workers for more flexible work arrangements

Six of the agencies interviewed referred to this factor as a reason for the growth of labour hire. Mention was made that some people in this day and age were attracted to the temporary lifestyle, and wanted flexibility as to how they worked. This was tied in to the more transient nature of people and the workforce today. In this regard it was thought that more skilled workers were likely to be more mobile in the job market and to have "loyalty for the work as against loyalty to the organisation".

To a lesser extent unions interviewed thought that some workers wanted more flexible work patterns for themselves in view of their particular circumstances. On the other hand some unions expressed the view that changing and tightening labour markets for workers were forcing workers to take labour hire jobs.

On the issue of a more flexible lifestyle, there was agreement between agencies and unions that the makeup of the workforce was changing, and some people were looking for employment opportunities that fitted in with their lifestyles. Whether there was both or only one parent working in some families, those people felt a need for flexibility with their family and life and so were looking for more options. In the view of one agency these people went to agencies because they wanted the temporary lifestyle, and because they "don't want to work 9 – 5 Monday to Friday".

Another agency opined that "there will always be a ready market of people who want a flexible lifestyle". This mobility by employees now was aided by portable superannuation provisions.

One union had an original viewpoint on the flexibility sought by some labour hire workers and considered that what they were really after was a form of short term flexibility. It commented:

> I mean most of the people we speak to in labour hire, they are often saying to us 'yes, we do want flexibility', but often it is a short term flexibility that they want. Their own, whether it be financial or social or family, circumstances change and eventually they want to work, move into something more permanent. What you can do is you maintain your skill base, so you have the skill base there.

In addition to the desire for greater flexibility, there was an agency view that people discernibly were becoming more transient or mobile in their style of living and employment choices.

One comment summarised the trend as follows:

> I think it is the way of the market, the way of the world, the transient population is happening. I just think that the transient nature of people today is one of the key factors.

It was pointed out that persons with high skills or wishing to improve their skills and marketability were being mobile to fast track their careers, and were likely to reject a work environment or culture that did not suit them. One comment captured the attitude in the following terms:

> With an educated workforce which we now have, people are saying "I don't want to work for the same employer all my life like my father did'. The career aspirations now for graduates is that they are going to have four or five careers in their working life. The world is trying to find the commodity of a person with the skills in the right place at the right time.

6.5.3.2 Negative factors in the expansion of labour hire

There are other factors in the expansion of labour hire that perhaps could be viewed in a negative light, or at least viewed as giving rise to problems for the industry. They are:

(a) the ease of entry into the labour hire industry and the non-regulation of the industry;

(b) the perceived over regulation of the standard employment relationship and the subsequent desire by employers to shed their responsibilities; and

(c) the general trend towards cost cutting by private employers and governments.

The data on these factors unequivocally supports the hypothesis developed by the writer, that the impacts of the regulation of the standard employment relationship has been responsible for employers seeking less regulated labour markets such as labour hire.

The factors will be dealt with in turn.

(a) Ease of entry into the industry and non-regulation of the industry

Four agencies specifically referred to the fact that in Queensland (like the rest of Australia) there were no statutory requirements for a person or body to set up and operate in business as a labour hire agency. Registration was only required (in

Queensland under the *Employment Agencies Act 1983 (Qld)*, where agencies wished to operate in addition as strict recruitment or direct placement service providers for organisations (which quite a large number apparently did in practice), or under the *Security Providers Act 1993 (Qld)*, if agencies wished to work in the security industry. Labour hire operators were regulated only incidentally by virtue of being general employers. One agency noted that "a labour hire company does not have to have a licence, you only have to have a licence if you are a recruitment company".

Because of the ease of entry into the industry, it appears from responses from agencies and unions that because of the large numbers of agencies operating the industry is a very competitive market, and possibly overcrowded. Also the non-existent qualifications for operating gave rise to doubts about the technical and ethical calibre of some of the operators in the industry. These preceding circumstances have implications for the operation of the labour hire industry generally.

The agencies concerned all remarked on the ease with which people could enter the industry, and thought that clearly this could create problems with respect to quality of service, over supply and excessive competition in the industry, and abuses such as the undercutting of rivals and "fly by night" operators.

One agency made this direct comment on the ease of entry into the industry and its attendant consequences:

> And this is the problem with labour hire, it has been terrified for many years because it has been abused in the past.
>
> There are no education requirements. There is no governing body to say this is how you have to do it, so I could open up a shop tomorrow and pretend to do labour hire and do it very badly.

Despite the proliferation of operators due to the lack of barriers into the industry and the lack of surveillance by government, one agency offered some consolation that the law of supply and demand naturally helped to curb abuses in the industry, because those not operating a quality service would be culled out. It commented:

> It gets back to the supply and demand theory. There was demand so they just sprung up everywhere. You and I ten years ago, we could have just gone down the road and started one. There was not a basic requirement of entry level requirement, so I guess a lot of them spawned up, that made it look like a growth industry. But the ones that could not provide a quality product have either gone or found themselves in trouble, maybe through over capitalisation, over estimating the market size. A couple of them as well, they are rationalising.

At least in part because of the non entry requirements, according to the agencies the labour hire industry has become a very competitive industry in the last ten years with a high burnout and turnover rate of staff that work in agencies. The operator remarked about the competition that "It is fierce. It is absolutely cut throat". This situation created disadvantages for those operating or working in the industry, as it led to problems such as undercutting of competitors and dubious practices by operators.

Undercutting of rivals usually affected the labour hire workers because it meant paying below award or collective agreement rates, or ignoring classification structures. Dubious practices included labour hire consultants attempting to steal

their previous agency's clientele, or adopting a new identity after previous failed operations in the industry.

In part, because of the lack of any government monitoring, one agency noted:

> They come and go. You see what happens is, they change their names. So someone will be company XYZ and will be ABC next week. So it is hard to tell whether it is new players coming and going or whether it is people reinventing themselves, getting a different image or whatever.

(b) Perceived over regulation of the standard employment relationship

Nineteen of the agencies interviewed considered that this was a key or important factor in the rise of labour hire. Because of the perception that there were increasing regulatory burdens, such as unfair dismissal, anti-discrimination and occupational health and safety laws, in addition to workers' compensation, holiday and long service leave, payroll tax, superannuation and award requirements, it was the opinion of agencies that employers were much more willing and eager to shed their normal employer responsibilities. In particular, they thought that there was an employer fear of the unfair dismissal laws. This view was backed up by two of three labour hire workers interviewed, who thought strongly that there was an employer preference towards labour hire, because employers wished to evade or did not want to take responsibility for employment issues. This assessment was supported by ten of twelve unions interviewed.

There was a general feeling amongst the agencies that the industrial relations environment had precipitated the rise in labour hire. As the rights of employees and

the obligations of employers had increased, many employers (including governments) had become frightened to take on permanent staff. Labour hire was increasing, because it was seen to be taking a lot of responsibilities and worries, for example with respect to unfair dismissal laws, away from an employer and placing them with a labour hire agency. In this regard one labour hire worker stated that "they want to use labour hire companies as employers to absolve themselves of responsibility".

As an illustration of this general viewpoint, comments of different agencies were as follows:

> Unfair dismissal. I think that this is one of the major areas why labour hire has taken off so big.

> One of the biggest growing industries in Australia, well because it has taken a lot of the responsibility and worries away from the client. I guess the unfair dismissal laws are one less worry for them – that is our worry.
> Well, they do say they are worried about the unfair dismissal laws and that is why a lot of them tend to use labour hire.

> It really took off when they introduced the unfair dismissal laws. It really is a way around that. It is still going, it is still growing, as opposed to staying in a level percentage. Ten years ago, labour hire might have been three, four, five percent, I have no idea of figures, but I would say that it has doubled or tripled that, and that one of the main catalysts for that is unfair dismissal laws.

> Trying to grapple with the unfair dismissal laws is the main source of concern. We are in the business of marketing services so we know what the hot buttons are. It is not so much what actually happens, it is the perception of what they think is going to happen. They do not know whether they are going to get sued and taken to court over unfair dismissal, so the best thing is not to employ in the first place.

On the effect of the unfair dismissal laws, one female agency owner stated that employers definitely were put off by publicised unfair dismissal decisions, especially

those that appeared perverse, such as where an employee had been accused of wrongdoing and yet awarded compensation. Her thoughts were as follows:

> Can I be naughty and I say I think it is because of the unfair dismissal laws. Employers are more likely to try before they buy. In white collar, they will put a person on as a temp until they are happy to do otherwise. But I think particularly in the industrial area once a company has been burnt through an unfair dismissal or they have heard of a mate who has had an experience, they will go with the try before you buy. If you keep that phrase in mind that explains a heck of a lot of your labour hire, and the economic flows of a business.

By way of contrast, one union queried the impact of the unfair dismissal legislation and considered that there was an unreasonable fear of the legislation. In his knowledge only half of one percent of applicants were reinstated and in countries such as Britain, Europe and New Zealand the availability of the remedy had not created any major problems.

In the view of a peak employers' body the special nature of labour hire militated against the institution of unfair dismissal claims in general because when a labour hire employee's services were terminated at one client's workplace, that employee then might be relocated almost immediately to another job with another client. Alternatively the body thought that it could be argued that a labour hire worker's job at a particular client's location was just an assignment for a fixed period.

The peak body expounded on this advantage of labour hire:

> The beauty of labour hire is that even though they may be terminated at that particular site, they can then be relocated at another job. Who actually did effect the termination? It could be argued that it was just an assignment. The only extent

> they (the clients) should be getting involved is one to tell the labour hire company when it is getting to the point or even close to the point they need to issue a warning before they actually terminate their employment.

Overall according to the agencies there was the perception that employment law was now a lot more complex, and as a result a large number of firms and governments in Australia did not want to deal with it. One large agency owner was firmly of the view that over regulation of industrial relations in Australia was a primary driver of labour hire, and that more regulation of workplaces would only generate more work for operators such as himself. In his view, "it is purely driven by the regulation and legislation in respect of industrial relations in Australia". The result then was that employment management became too hard to handle internally, so it was "outsourced" to labour hire agencies.

A problematic byproduct of the move by employers to shed their responsibilities by using labour hire is that they might develop a mindset of avoiding workplace responsibilities in general towards hired workers. As one agency noted, legislation for occupational health and safety has been tightened in recent years and a company director or manager could be held responsible where someone is injured on their site. This could occur where there is confusion over division of responsibility at the workplace.

(c) General trend to cost cutting in business

Fifteen agencies mentioned this heading directly as a reason for the expansion of labour hire. This factor is related to the previous factor of perceived over regulation

of employment matters, which provided an incentive to avoid employer responsibilities.

Eleven of 12 unions interviewed referred to the desire to cut labour costs, as a basic reason for the trend towards labour hire. Some noted the big trend towards rewarding CEOs and executives for decreasing staff. These unions felt that labour hire was used by clients because it was considered cheaper than standard employment, notwithstanding the casual loading (about 23 percent) that was applied to labour hire wages. One matter of interest was that two of the unions, like a couple of agencies, queried the cost effectiveness for client organisations using labour hire over the long haul. There was also concern by one union that labour hire could contribute to producing a burnt out workforce with underdeveloped skills.

The agencies made the general observation that "labour costs are expensive" and that companies "shed staff first to cut costs". There was also union sentiment that various employers were after high flexibility as to wages paid, in line with American models, so that for example a security guard could be obtained from $2 to $20 an hour. By virtue of the flexible and non-regulated nature of labour hire, labour hire appeared a cost effective way of engaging employees, particularly where agencies allowed credit. Labour hire fitted in with economic rationalist views of reducing staff to minimum levels and flexible strategic planning by companies.

Some agency comments backing up the preceding approach were as follows:

> Definitely, well because they have not got to maintain a big staff base, they only pay for what is used really, so that definitely saves them money in the long term. I think organisations are really trying to cut their workforce to the bare bones.

> It is just more effective for an employer to use a labour hire agency. We do all the organising, co-ordinating, recruitment, selection, follow-up, OHS, EEO – we take the hassle out of the work.

> Convenience, plus if I am paying your employees you are not tying up your own cash flow each week. If you are a company and you can put your wages bill off for a month, it is big. If you have got ten or twelve people working for you, it might be $30,000 or $40,000 cash you are not paying each week.

With respect to the cost of hiring labour hire workers, one labour hire worker mentioned in passing that one way that the unions were attempting to counter the trend towards labour hire was through moves to increase rates for casual workers (which included labour hire workers)in awards and collective agreements. In this way labour hire would become a more expensive and less attractive option for organisations.

A problem referred to by the agencies and unions, that was associated with using labour hire to reduce labour costs and work conditions, was that unscrupulous or unethical labour hire operators cut labour costs (and undercut other operators), by paying below the relevant award or enterprise bargaining agreement rates. This might be on the basis that there was some argument or doubt as to the applicable standard. It seemed that smaller labour hire agencies were prone to being undercut and forced out by larger or multi-national companies, who then established their own rates. In addition, it was also indicated that government clients through engaging

labour hire staff paid substantially lower rates than normal, by being able to avoid public sector award conditions. In this way they could reduce financial pressures.

A resultant concern for labour hire agencies was that the drive to cut costs could create an unlevel playing field. Ethical labour hire operators could and have been undercut by unethical ones. A union described the situation this way:

> But there is more than one labour hire company in there, so they are tendering all the time to get that particular contract. So they are trying to cut back, cut back, cut back, and where they cut back is with the conditions of the employees. That is how they win their contracts.

Another union made a cynical comment on the use of labour hire to cut costs:

> The analogy I always think of is that water will find the lowest point it can find. That is what it is. It is a vehicle to try to find a cheaper way of employing. I suppose why many of the companies are using labour hire is because of that costs benefit. But we need to remember that the margin of $2-$3 employees are getting paid less is the whole reason for the labour hire company. They exist because there is a profit to be made.

There was also union feeling that improper cost cutting could reduce morale amongst labour hire workers. Underpayment could add to feelings of precariousness and instability experienced by some labour hire workers.

There was some particular concern by unions as to the effect of cost cutting measures on workplace health and safety. A fear was expressed by one union that especially with construction jobs, labour hire and other workers could die if the controlling parties did not spend on adequate safety measures. Another union was worried that

labour hire offered to companies an escape from mounting workers' compensation premiums, for a bad safety record. It stated that "we have heard of companies in Western Australia that had such a bad health and safety record, their Workcover premiums were going through the roof and to get rid of that they just used labour hire workers".

Chapter Seven reviews the thesis and discusses the implications of the research analysis, in the context of the theoretical contentions or themes regarding the nature and growth of labour hire.

Chapter Seven

CONCLUSIONS

This thesis concludes with a review of the content, identification of significant contributions, and implications/recommendations for the future of labour hire.

7.1 Review

A major theme is that because of its unique tripartite nature, labour hire runs counter to or is antithetical to the common law employment principles which are used to govern it, and that tensions exist between the concept of labour hire and the present legal principles. It is argued that the nature of the labour hire relationship creates problems with allocation of risk and legal responsibility, which are not satisfactorily recognised or resolved by the law. Difficulties arise because there are two parties, the labour hire agency and client, and both assume or split the traditional functions of an employer. The area of labour hire employment however is not specifically regulated, but is subsumed under common law contract of employment principles.

The second major theme is that the growth of labour hire is a reaction to the impact of regulation of the standard employment relationship. This regulation of direct employment, with its obligations and costs, has had the effect of greatly increasing incentives for organisations to utilise less regulated or largely unregulated labour

markets such as labour hire. Labour hire enables businesses to devolve the obligations and costs connected with direct employment, such as unfair dismissal obligations, vicarious liability and workers' compensation.

Examination of the key research findings of the extensive exploratory field work of this thesis support and validate the two theoretical propositions or expectations. Considerable support is found for the expectations about the problematic nature of labour hire, and the relationship between regulatory impact and the growth of labour hire is confirmed. The results are thus consistent with theoretical expectations.

Firstly there are key research findings about the tensions between labour hire and present legal principles as to employer responsibilities. Nearly half of all agencies interviewed considered that the sharing of control and responsibility for a worker, between the agency and the client, posed problems with respect to worker safety, liability for the actions of a worker, and termination of a worker's services. In particular half of the agencies (and all unions interviewed) though that OHS was a major issue in the engagement of labour hire workers. A smaller number of agencies saw termination of a worker's services as a problem with potential industrial relations implications. The research also disclosed fairly regular attempts between clients and agencies to disclaim liability through contractual documentation. The disclosed problems about allocation of legal responsibilities is supported by the examination of selected Australian cases undertaken, which reveals scope for confusion about the operation of labour hire responsibilities.

Secondly there are key research findings about the link between the growth of labour hire and the increase of regulatory employment mandates. Over half of the agencies interviewed (and almost all the unions) considered that the perception of increasing regulatory burdens on an employer was a key factor in the rise of labour hire. Because of this perception employing organisations were much more willing and eager to shed their normal responsibilities. In particular over half of the agencies referred directly to a fear of unfair dismissal legislation, as a reason for the use of labour hire by client organisations. Overall the feeling from the agencies was that labour hire was increasing because it was seen to be taking a lot of responsibilities away from an employer, and placing them with a labour hire agency. The response by over half the agencies (and almost all unions) as to the cost cutting attractions of labour hire, through not having to bear the mandated costs of employment, only further reinforces the perception about regulatory burdens.

These research findings as to the link between the effect of regulatory burdens and the rise in labour hire is supported by the American literature cited, which points to a clear trend by employing organisations to use less regulated forms of employment, and in particular labour hire.

The research also unearths a clear finding that a large proportion of agencies (and unions) interviewed identified (apart from general economic trends) managerial trends towards greater workplace flexibility and efficiency, as a distinct reason for the greater use of labour hire. This is considered not to be really contradictory or inconsistent with

the key findings already cited. In this context the ease of hiring and removal of staff was frequently cited. This ties in with the notion that labour hire provides employing organisations with the capacity to increase or decrease staffing numbers, without any direct employment relationship and obligations. Thus this managerial flexibility factor cited is compatible with the trend to labour hire, as a means of avoiding regulatory responsibility.

7.2 Contributions

This thesis provides at least seven significant contributions. First, the empirical studies in this thesis are significant because no similar Australian study has been published. Up till now little information has been available on how labour hire agencies actually operate in Australia, and in particular Queensland. This work provides information on how labour hire agencies actually operate in practice, involving extensive in-depth interviews of labour hire agencies and other bodies.

Second, in the study a theoretical assessment is made of the suitability of applying traditional employment principles to a labour hire situation. It is argued that the labour hire situation runs counter to the notions contained in common law employment principles. It is shown that the application of principles to labour hire is problematic in a number of areas such as unfair dismissal of a worker, vicarious liability and anti-discrimination legislation.

Third the research fieldwork conducted backs up American and Australian theories and evidence, that a prime factor in the expansion of labour hire is the increasing regulatory impact on standard employers.

Fourth, the preceding findings show that common assumptions about the expansion of labour hire are incomplete. Labour hire is not just a creature of economic and managerial concerns. It has been argued for instance that labour hire's great attraction for employers in particular lies in the flexibility that it provides in staffing levels for employers. This work goes beyond the common assumptions about the rise in labour hire to demonstrate that regulatory impact of standard employers has had a major effect on shifts to work patterns such as labour hire.

The work supports the American studies (such as Houseman, 2001:162-166) which contend that a major reason for the use of flexible (labour hire) staffing is to reduce labour costs, and that as (Rabin-Margalith, 2003:311-344 argues) employers are turning to contingent labour to avoid mandated costs associated with standard labour. The results of this work therefore make an important contribution to the growing literature on the concept of labour hire.

Fifth, this work promotes greater recognition of the possible unintended consequences of regulation of employment. The imposition of perceived increasing regulatory burdens has had the effect of forcing employing organisations into less onerous

alternative labour markets such as labour hire, where an increasing number of workers enjoy less security of tenure.

Sixth, the writer has drawn attention to and advocates the need for consideration of and allowance for the special nature of labour hire. The writer's claim is that labour hire is a distinct work form with unique characteristics, unlike those of standard employment. Accordingly labour hire should be analysed more in terms of its special tripartite arrangement, which involves the splitting of responsibilities between an agency and client. Little attempt has been made by policymakers and courts overall in this direction.

Seventh, some suggestions are proposed by the writer as to how labour hire should be dealt with in the future in the following section.

7.3 Limitations and future research

The thesis uses a theoretical and empirical approach, and is based on the regulatory impact on the standard employment relationship. This approach emphasises the perceived burdens on employers by regulation, which causes them to be attracted to less regulated labour areas, such as labour hire. A converse situation would be where regulation of standard employment is in fact reduced where the attractiveness of labour hire possibly would be less enhanced.

The thesis is subject to particular limitations. First, one limitation concerns the geographical scope of the study. The thesis is principally limited to labour hire agencies in Queensland (in particular South-East Queensland), though a number of the agencies operated Australia-wide. On the other hand there was a high response rate by agencies to the study.

Second, the thesis is essentially exploratory and concentrates on general themes. Its aim is to ascertain, canvass and draw attention to important issues pertaining to the area of labour hire.

Third, the thesis is subject to possible subjective perceptions of the researcher towards the participants of the study and their information.

Fourth, there may be a self-selection bias in that selection of participants may have been influenced by factors of geographical convenience, and the likelihood of availability.

Fifth, allowance may have to be made for the potential effects and impacts of the interview process on the interviewees. An interviewee may have provided responses perceived to be desired by the interviewer, or with a view to having changes made to the industry.

The Commonwealth government by its recently passed *Workplace Relations Amendment (Work Choices) Act 2005* has sought to fundamentally change workplace relations in Australia, by setting up a national system of workplace relations through the

use of the corporations power under section 51(xx) of the Australian Constitution, which is designed to override the States' systems. A clear aim of the Act, through its rationalisation of the award and collective bargaining system, is a general deregulation of industrial relations and a move to further individualise work relationships. One feature of the legislation of note is that unfair dismissal claims will be limited to employees engaged by employers having more than 100 employees. Another significant feature is that restrictions on labour hire in awards and agreements will be non-allowable matters.

The *Work Choices Act* is in its early stages of implementation and its major effects are yet to be felt. If however the overall result is that regulatory burdens are lifted on standard employers, then alternative workforms such as labour hire may lose some of their attraction for business organisations. Future research is required on these developments.

7.4 Implications/Conclusions

First, greater consideration and emphasis should be given generally to viewing labour hire as a discreet and distinct part of employment law, with features that cannot be comfortably dealt with under traditional common law employment principles. As the thesis demonstrates the labour hire arrangement is more complex than has been previously theorised. As the thesis indicates conventional traditional remedies are inappropriate means in addressing the essentially structural issues of labour hire.

Consideration needs to be given to new judicial and legislative approaches to labour hire which acknowledge its unique tripartite nature.

Second, consideration should also be given by policymakers to the consequences of "over-regulation" of the standard employment relationship, in the sense that core workers continue to be more privileged, at the expense of an increasing sub-class of worker.

Third, the findings of the study raise the issue of whether some direct regulation of the labour hire market would be appropriate, with a view to lessening the likelihood of operators entering the labour hire industry, who are attracted largely by immediate financial returns, at the expense of safety and other issues. The case law and empirical evidence suggests that, because of the division of responsibility between agency and client, labour hire only can work satisfactorily and safely if both parties adopt a diligent approach to their respective roles.

Consideration should be given to at least a basic registration system of labour hire agencies, that would screen out the unethical and unconscientious operators, who are likely to create unfair competition for bona fide operators through dubious cost cutting and safety skimping measures. Such a registration system would help maintain higher standards in the industry. On the subject of regulation despite globalisation and other factors, it would still appear to be a political choice for governments, whether or not to go down the deregulated labour market path or not.

Fourth, consideration should also be given by policymakers and the courts to the implementation in certain circumstances of the concept of joint employment, whereby a labour hire employee could be permitted to take action against either a labour hire firm or host company or both. Such an action could be apt in actions for unfair dismissal, where a client has instigated the inappropriate termination of an employee's services. Similar to the situation of piercing the "corporate veil" in corporate law, an employee should be allowed to pierce the "employment veil" protecting a client. In *Morgan & Kittochside Nominees Pty Ltd (2002)* 117 IR 152 a Full Bench of the Australian Industrial Relations Commission was of the opinion that there was no reason why Australian law could not follow the U.S. courts in recognising the concept of joint employment, where two parties each exercise significant control over the worker.

The concept of joint responsibility in labour hire is already entrenched in occupational health and safety regulation, where both agency and host company are liable to prosecution if they fail in their respective duties. The Stevens Report 2002 also made a specific recommendation that a labour hire employee ought to be able to take action in an Industrial court or commission against a labour hire agency, host company or both, for unfair dismissal or underpayment of wages. The issue is a matter of policy but questions of fairness would seem to raise at least a consideration of the application of the doctrine.

Labour hire appears likely to continue as a work form for the indefinite future, because of the continuing drive to reduce labour costs and obligations. The challenge for

legislators and judges is to ensure that the legal rules affecting its operation accurately reflect the actual realities of a labour hire arrangement. Recognition of the special nature of labour hire is essential in meeting this challenge.

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